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Supreme Court, U.S.
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No. ________

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In The

Supreme Court of the United States

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SYLVIE M., by next friend Diane R.; Diane R.,
Petitioners,
versus

BOARD OF EDUCATION OF DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT,
Respondent.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

Whether, when there has been no additional evidence taken by a district court on review of a state administrative hearing officer's findings under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the district court may conduct a "virtually *de novo*" review so as to reverse the administrative findings without any reference to those findings or explanation as to why the district court disagrees?

Whether passing tests, including standardized tests, is sufficient educational benefit under IDEA for a disabled student with high average to superior intelligence when she is also failing courses and when a substantial area of disability has not been assessed or addressed by the school district?

Whether a unilateral placement under IDEA, made by parents pursuant to *School Comm. of Burlington v. Department of Education of Massachusetts,* 471 U.S. 359 (1985), is subject to IDEA's least restrictive environment (LRE) provisions?

PARTIES TO THE PROCEEDING

Petitioners are Sylvie M by her next friend and parent Diane R, and Diane R.

Respondent is the Board of Education of Dripping Springs Independent School District, in Dripping Springs, Texas.

There are no parent companies or non-wholly-owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion (App. A) is unreported pursuant to 5th Circuit Rule 47.5. The district court opinion (App. B) is reported at *Sylvie M. v. Board of Education of Dripping Springs Independent School District*, 48 F. Supp. 2d 681 (W.D. Tex. 1999). The district court opinion restricting the scope of evidence presented (App. C) is unreported. The state administrative hearing officer's Additional and Amended Findings of Fact (App. D) and Decision (App. E) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, affirming the decision below, was entered on May 5, 2000. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331, arising under both the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, as well as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, together with their implementing regulations. Pertinent parts of the statutes and regulations are found at Appendix F.

STATEMENT OF THE CASE

Petitioners Sylvie M and her mother Diane R seek reimbursement for a unilateral special education placement in a residential setting. Petitioners contend that unilateral placement was necessary because the local public school district, Respondent Dripping Springs Independent School District, failed to timely evaluate special education student Sylvie M for a serious emotional disturbance and failed to provide appropriate services for that disability, leading to a crisis situation. Prompt action was necessary to resolve that crisis, so that the parents acted when the school district failed to do so. Sylvie M has since successfully graduated from the unilateral placement, Elan School. Thus, the only issue remaining is reimbursement to parents.

Petitioners filed a request for a state administrative due process hearing pursuant to IDEA on July 22, 1996. They contended that Defendant Dripping Springs School District failed to provide Sylvie M with a free appropriate public education as required by IDEA. Therefore, they sought reimbursement for and prospective placement at the private special education residential school at which Sylvie's parents had placed her – Elan School. A due process hearing was held November 12-16, and an opinion was issued on January 10, 1997. App. E. Additional and Amended Findings of Fact were issued on January 30, 1997. App. D.

The administrative hearing officer found that the School District failed to provide FAPE, but that the unilateral placement was also not appropriate. App. 79a; 80a. Rather than reimbursement, the hearing officer ordered changes in the District's IEP and 40 hours of compensatory counseling. App. 82a. The hearing officer denied reimbursement based on her belief that Elan was not an appropriate placement for Sylvie, and that it would, in fact, be harmful to Sylvie. App. 80a.

Plaintiffs Sylvie M and Diane R filed their complaint in federal district court on April 23, 1997. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction). At the district court, plaintiffs sought reversal of the administrative opinion to the extent it found Elan to be an inappropriate placement and denied payment for the placement.

On October 16, 1997, Defendant School District filed its Answer and Counterclaim, appealing the underlying administrative findings that the school district failed to provide FAPE and the award of compensatory services.

Plaintiffs asked the district court to hear additional evidence, while defendant filed a motion to limit the scope of trial to the administrative record. The district court granted in part and denied in part the Motion to Limit the Scope of Trial, permitting each party to introduce no more than 50 total pages of additional evidence and briefing. App. C. Plaintiffs submitted a brief with additional evidence on the issue of the appropriateness of Elan for Sylvie. Defendant submitted a Motion for Judgment on the Record with supporting brief, but did not supply additional evidence.

At the completion of the briefing and the Plaintiffs' (but not Defendant's) production of additional evidence, on May 5, 1999, the District Court entered judgment in favor of the School District on its Motion for Summary Judgment. App. B. Contrary to and without addressing the administrative findings, the district court found that the school district did provide FAPE to Sylvie M App. 41a. The district court did find, based upon the additional evidence submitted by plaintiffs, that Elan was possibly, "the optimal setting for Sylvie." App. 41a. The district court concluded, however, that Elan was not the least restrictive environment, and thus was not reimbursable even if the school district had failed to provide FAPE. App. 42a.

Plaintiffs filed their appeal to the United States Court of Appeals for the Fifth Circuit on June 3, 1999. The jurisdiction of the Fifth Circuit was invoked pursuant to 28 U.S.C. § 1291. On May 5, 2000, the Fifth Circuit affirmed the district court opinion. App. A.

A. Summary of Educational History[1]

Sylvie M resides with her mother, Diane R, within Dripping Springs Independent School District, in Dripping Springs, Texas. Dripping Springs Independent School District found Sylvie M to be eligible for special education services under IDEA, with a disability in math, in her sixth grade year (1992-93). She continued to be eligible for special education services throughout the relevant period herein. The issues presented in this litigation have been what her disabilities were, when the school district should have evaluated for those disabilities, and whether appropriate individualized services were provided to address her disabilities.

Sylvie's intelligence is in the high average to superior range. She has a history, however, of deficits in math as well as processing skills and in writing things down on paper. Parents therefore report that Sylvie has for some time been resistant to completing school work, including homework assignments. Her resistance to class work and homework resulted in lies to her mother, father and stepfather, in threats to run away or to commit suicide at times when grade reports were due, and in escalating conflicts at home. During Sylvie's seventh grade year (1994-95), parents decided that Sylvie would stay with her father in Paris, France to attend a small private school. The problems at grade reporting time continued there. Thus, in spring of 1995, as grades came out, Sylvie took a quantity of aspirin and had to be taken to the hospital to have her stomach pumped. Sylvie thereafter returned to her mother's home, and to Dripping Springs Independent School District.

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[1] Only a brief summary of Sylvie's educational history, leading up to her unilateral placement, is set forth here. The administrative record is voluminous and includes five days of hearing testimony.

Upon Sylvie's return to Dripping Springs, her school related conflicts continued. Near the end of May, 1995, Sylvie sank into a terrible depression and threatened to leave or kill herself. As a result, on May 19, 1995, she was admitted to Shoal Creek Hospital. Sylvie's diagnosis upon discharge was major depression, single episode, dysthymia and attention deficit hyperactivity disorder. Sylvie was also diagnosed as having a bipolar disorder – manic depression. Diane R kept the school district informed of Sylvie's behavior and hospitalizations.

Sylvie continued to have problems in completing school work, and thus her home conflicts escalated. In November 1995, after Diane R confronted Sylvie about another negative school report Diane had learned was coming, Sylvie became angry, went to her room, slammed the door, and later reported that she had taken an overdose of aspirin. She was taken to the hospital again.[2]

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[2] In response to Mrs. R's disclosure of this suicide attempt, on November 28, 1995, after talking to Sylvie, but without recommending or conducting any assessment of her emotional status or talking with Sylvie's psychiatrist, substitute staff member Vicki Fuller completed a "stay alive" contract with Sylvie. In this contract, Sylvie simply promised to call someone before she attempted suicide. The school district did not tell parents about this contract, or that this was its only response to

Sylvie failed health and her first semester of world geography. These subjects were unrelated to what the school district identified for Sylvie: a learning disability in math. On January 29, 1996, Sylvie's English, physical science and world geography teachers sent an interim progress report home noting failure or grades below 70% in these three core courses. Sylvie's behaviors at home escalated, and on February 15, 1996, she ran away from home for several hours.

By March of 1996, Sylvie was failing three courses. The school district devised a plan which included continuing the same strategies they had been using, plus incorporating after school tutoring.[3] Sylvie was informed

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Sylvie's suicide attempts. Indeed, at the administrative hearing, the school district witnesses testified that they really did not believe Sylvie was suicidal, based on her conversation with school staff. Instead, they believed she was just seeking attention. In contrast, her personal psychiatrist testified that he considered Sylvie a high suicide risk as a result of her manic depression. Thus, the administrative hearing officer found "the evidence at the due process hearing, including the testimony of the district's psychologist, suggests that the counselor erred in summarily dismissing the risk of suicide." App. 76a. Moreover, the hearing officer continued: "[e]ven if Sylvie's intentions were exactly as she stated, her behavior raised a red flag. Regardless of the suicide risk, Sylvie's threats to kill herself and her actions mimicking suicide attempts strongly indicated an emotionally disturbed adolescent." *Id.*

[3] By this time, parents had already attempted private after school tutoring, as well as private counseling, to no avail. Additionally, although Sylvie was attending group counseling sessions at school, and although the school district believed her to be participating, she had not informed her counseling group or counselor that she was failing three courses. Indeed, the only explanation she ever gave in counseling regarding homework was that she just did not want to do it. The school district simply accepted her explanation at face value.

of this plan on March 4, 1996. On March 6, 1996, Sylvie ran away from home.

Sylvie's father flew from Paris to help find her. He found her on March 10, 1996, on the local "drag", with her head shaved, wearing black lipstick, heavy black eye makeup and a dog collar. She was resistant to returning with him, and did not even answer to her name, insisting that he call her "Karma." Sylvie's father testified at the due process hearing that Sylvie refused to return until he promised her that she would not have to return to Dripping Springs School. She also initially refused to return to her mother's home.[4]

Sylvie's father contacted the school district to discuss possible residential school options for Sylvie after finding her, as he believed that she was still a runaway risk. The school district did not refer him to any local residential placement that met Sylvie's needs and could take her immediately. Parents therefore located a residential special education placement in Maine – Elan School – that could take Sylvie. Elan reviewed Sylvie's records to determine whether she would fit within its program. Sylvie's psychiatrist also reviewed Elan's program for suitability. Both agreed that Elan was appropriate for Sylvie. On March 14, 1996, therefore, Sylvie and her father traveled to the Elan School to enroll her. After an initial thirty day trial, she was re-assessed and found by Elan to continue to be appropriate for their program.

Mrs. R advised the school district regularly about Sylvie's behaviors, hospitalizations, suicide attempts and threats and run away threats, as well as Sylvie's diagnoses. But the school district did not conduct a psychological assessment of Sylvie based on mother's reports. The school district still did not conduct a psychological assessment of Sylvie when it conducted her three-year reevaluation in December of 1995.[5] The school district did not complete a psychological evaluation of Sylvie until after parents placed her at Elan and initiated due process proceedings seeking reimbursement.

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[4] Because this runaway occurred during Spring Break, the school district argued, and the district court agreed, that it could not be related to school issues. The administrative hearing officer found otherwise.

Petitioners presented additional evidence to the district court (not refuted by the school district) as to the appropriateness of the program at Elan, how Sylvie fit within that program and that Sylvie had been very successful educationally and emotionally at Elan. In fact, Sylvie had graduated from Elan and was preparing to enter college at that time.

Respondent school district argued below that it had provided FAPE to Sylvie M: she was receiving educational benefit because she scored well on most of her tests and on standardized tests was at grade level except in math. The school district argued that Sylvie was only failing her classes because she just did not do her homework, a common occurrence among freshman students. The district further contended that Sylvie was placed at Elan because of family conflicts, not for educational reasons. The school district also argued that Elan was not appropriate to meet Sylvie's needs. Finally, the school district argued that Elan's tuition was not reimbursable in any event because it was not the least restrictive environment in which Sylvie could receive educational benefit.

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[5] IDEA provides that students eligible for special education services be re-evaluated at least every three years or more frequently as conditions warrant.

Respondent contended that other less restrictive alternatives were available at the school district and should be tried before a residential placement could be reimbursed. The school district, however, had never previously recommended any other such placement.

B. Administrative Opinion

The administrative hearing officer took testimony for five days, took voluminous evidence and took post-hearing briefs. *See* App. 54a. She issued a Decision on January 10, 1997 (App. E at 53a). Upon requests from both parties, January 30, 1997, the hearing officer issued Additional and Amended Findings of Fact (App. D at 48a), but did not revise her conclusions.

1. Findings regarding Dripping Springs

The hearing officer found that Dripping Springs Independent School District had failed to provide a free appropriate public education ("FAPE") to Sylvie M as required by IDEA. 20 U.S.C. § 1400(c). Specifically, the hearing officer found that the school district's January 1996 annual IEP and its April 1996 IEP addressing both remainder of the 1995-96 school year and the 1996-97 school year were inappropriate. App. 79a.

The hearing officer's lengthy findings regarding Dripping Springs School District included, *inter alia*, the following:

> that the school district had reason to know during the 1995-96 school year that Sylvie had additional disabilities, that she was consistently failing courses, making suicide attempts and threats, but failed to seek a psychological evaluation until after Sylvie initiated the due process proceeding (App. 73a);

that by the time the district conducted Sylvie's three year evaluation in December of 1995, the district's diagnostician knew about Sylvie's failing grades, depression, suicide threats, suicide attempts, and hospitalization; but the diagnostician failed to perform any psychological testing, or to refer Sylvie for a psychological evaluation; this is despite the fact that the diagnostician noted "Sylvie's affective disorder is no doubt having a negative impact on her school success" (App. 61a);

that because the school district's three-year evaluation was incomplete without a psychological evaluation, the district's program for Sylvie was fatally flawed (App. 74a);

that the district had no meaningful plan for addressing Sylvie's failure to complete class work and homework, or her lack of organizational skills (App. 75a);

that, at Mrs. R's request, Sylvie was referred for a counseling assessment, which was conducted by Ms. Gravenor – a special education counselor working with Dripping Springs High School – by interviewing Sylvie and a teacher and by reviewing Sylvie's special education folder (App. 58a);

that based on this review, Ms. Gravenor recommended both individual and group counseling to total two hours per month, but that individual counseling did not begin until November 28, 1995, after the Thanksgiving holiday (App. 58a – 59a) and after Sylvie's mother reported another suicide attempt; even then, the district provided only four individual counseling sessions from November 1995 to March 1996 (App. 74a);

that the counseling sessions provided to Sylvie by the school district were insufficient to address her serious emotional disturbance (App.

74a); in fact, although Sylvie was failing three courses by the second six weeks of school, she never informed either her therapy group or Ms. Gravenor of this failure (App. 59a);

that Sylvie admitted to Ms. Fuller from the school district that the suicide incident over Thanksgiving break, 1995, was in response to Sylvie's fear over her mother's reaction to her (Sylvie's) poor school performance (App. 60a);

that the school district counselor erred in accepting Sylvie's version of her attempted suicide and summarily dismissing the risk of suicide (App. 76a);

that the District ignored Sylvie's obvious need for a psychological evaluation in 1995 and throughout 1996 while she was in the District prior to her placement at Elan (App. 76a – 78a);

that the District ignored Sylvie's serious problems, much like "Nero fiddled while Rome burned" (App. 77a);

that while the district is not responsible for Sylvie's serious emotional disturbance, it is responsible for identifying her disability and addressing its educational impact (App. 77a);

that one of the district's employees testified, in effect, that she would refer a student for psychological evaluation only if the student exhibited extreme behaviors in the classroom, and that Sylvie did not exhibit such extreme behaviors (App. 77a);

that the District's "failure to seek a psychological evaluation has had tragic implications for Sylvie", that [h]er lost educational opportunities cannot be replaced", that [t]his unfortunate situation occurred because the district failed to obtain the information it needed to address Sylvie's educational needs" (App. 77a – 78a);

that both the January and April 1996 IEPs were developed after the fall semester in which Sylvie failed to turn in much of her homework, failed two courses and barely passed three courses. "Considering Sylvie's intelligence and abilities, her pathetic grades [in the District program] indicated that she was not receiving an educational benefit" (App 78a);

that the school district admitted in its April 30, 1996 IEP, based upon Sylvie's psychiatrist's report, that Sylvie was emotionally disturbed, that this emotional disturbance was her primary disability, and that her bipolar disorder and ADHD were significant health factors that affect her in an instructional setting (App. 64a);

that although the April 30, 1996 ARD team finally recommended a psychological assessment, it never asked Sylvie's mother to sign the required consent form to obtain such an evaluation (App. 64a);

that when the school district finally did obtain a psychological assessment – during the due process proceedings – its psychologist agreed with parents' psychologist that Sylvie's diagnosis of "dysthymia, early onset" was correct, indicating that Sylvie had been depressed for a long time; both agreed that she had been depressed since before high school (App. 71a);

that, although the district seemed to blame Sylvie's mother for Sylvie's failure, the evidence overwhelmingly shows that Sylvie's serious emotional disturbance – and the district's failure to address it – were the primary causes of her failure, and stated that the district's engaging in conduct that poisons the relationship seems ill-advised (App. 78a);

that Sylvie's January 1996 and April 1996 IEPs, developed by Dripping Springs, were not reasonably calculated to confer an educational benefit and therefore were not appropriate (App. 81a) (citing *Board of Education of Hendricks Hudson Central School District v. Rowley*, 458 U.S. 176 (1982)).

2. Findings regarding Elan School

The hearing officer found that Elan was not an appropriate placement because she believed that Elan could not meet Sylvie's needs. Specifically, based on the evidence before her, the hearing officer found that Sylvie would not receive the intensive therapy she needed at Elan. App. 79a. Based on the evidence before her, the hearing officer also found that Elan failed to address Sylvie's secondary disability, her disability in mathematics. App. 80a. Based on the evidence before her, the hearing officer concluded she believed "that Elan may actually be harmful to Sylvie." App. 80a. The hearing officer therefore denied reimbursement for Elan (App. 82a), and instead ordered compensatory services in the form of additional counseling when Sylvie returned to Dripping Springs. App. 83a.

C. District Court Opinion

Plaintiffs appealed the hearing officer's denial of reimbursement for Elan. Dripping Springs cross-appealed the award of compensatory services and the finding that it had failed to provide FAPE. Plaintiffs presented additional evidence to the district court as to the appropriateness of Elan, including an affidavit from Sylvie, who testified (contrary to the evidence presented to the hearing officer by the school district's psychologist) as to her program at Elan, as well as her growth and success there.[6] Dripping Springs did not present any additional evidence to the district court on its appeal, and did not provide any evidence contrary to that provided by plaintiffs with regard to Elan School.

1. Findings regarding Dripping Springs

The district court conducted what it called a "virtually *de novo*" review, finding that Dripping Springs did provide FAPE to Sylvie.

Without referring to the hearing officer's findings with regard to Dripping Springs and the specifics of Sylvie's disabilities, the district court on its own review of the record found, *inter alia*:

> there was "repeated and undisputed evidence that it is very common for ninth graders to have trouble adjusting to high school" (App. 10a; see also App. 12a);
>
> following Sylvie's first individual counseling session at the school district, her counselor was of the opinion that Sylvie was not a suicide threat, and that her problems arose as a result of a conflict with her mother (App. 11a);
>
> that school district witnesses testified Sylvie did not look like a depressed child (App. 11a), that

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[6] Note that the school district's psychologist, who testified as to the inappropriateness of Elan's program at the administrative hearing, did not interview any of Sylvie's teachers at Elan or ask them to complete a behavioral checklist or other assessment instrument. Nor did he confer with Sylvie's psychiatrist, Dr. Ceballos, about the appropriateness of Elan for Sylvie. App. 52a.

they perceived her as very stylish and "sparkling" and she did not act like she was emotionally disturbed at school (App. 13a);[7]

school district witnesses testified that they believed Sylvie was receiving educational benefit despite her failing grades (App. 13a), as she was capable of passing their classes if she did her homework (App. 14a), they believed she was learning despite her failing grades (App. 17a), and that her failing grades were simply a result of Sylvie's unwillingness to complete her homework (App. 23a);

that the school district's psychologist, Dr. Keene, believed Sylvie was still learning despite her failing grades in some classes, based on her standardized test scores (App. 25a);

that as of March 1996, Sylvie's teachers did not express any concerns about her behaviors except her refusal to complete homework and her excessive socializing, or goofing off, in some classes (App. 17a);

that what mother characterized as "running away" for three or four hours the evening of February 14, 1996, the duration was too short to really call it running away (App. 15a);

that after this February 14 incident, Sylvie's problems focused only on family issues, not school work, as discussed in counseling sessions, and that, in fact, Sylvie "apparently felt favorable about school" (App. 15a-16a);[8]

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[7] Compare such findings to the hearing officer's finding that both parents' and school district's psychologists agreed that Sylvie was seriously emotionally disturbed, and had been depressed since before high school.

[8] The district court does note that on February 27, 1996, mother reported to the school district that Sylvie threatened to

that Sylvie was failing three courses as of the March 18, 1996 notice to mother primarily because she failed to turn in homework (App. 19a);

that the testimony of parents' psychologist, Greggus Yahr, was discounted because some of his conclusions were based on the testimony of Sylvie's father that she ran away because she did not want to return to school, when the "great weight" of evidence indicates she ran away because she did not want to live with her mother anymore (App. 21a)[9];

there was no challenge to the school district's procedures here (App. 33a).

The district court found that Sylvie was a bright child who was failing some of her classes because she failed to do her homework. The court thus focused its analysis as to whether Sylvie was receiving educational benefit on the issue of "why did Sylvie refuse to do homework and what should the school have done about it?" App. 37a. Without regard to the hearing officer's findings as to Sylvie's serious emotional disability and the impact it had on her ability to do her school work, the district court finds that "Sylvie appears to have been a rebellious child who, despite her intelligence, refused to adjust to the school's requirements. . . . There is no evidence that Sylvie could not, in fact, do the work had she chosen to do so." App. 37a.

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commit suicide if she was made to do her homework. App. 16a. However, the school district witness did not take this as a serious threat, as she "knew Sylvie well." App. 17a.

[9] Compare this to the hearing officer's finding, based on the live testimony of witnesses, that Sylvie's conflicts with her parents – including her father when she attended school in France – centered around school and homework issues.

The district court further finds, again without reference to the hearing officer's findings to the contrary as well as the undisputed evidence that mother kept the school district informed of Sylvie's problems – including her hospitalizations, suicide threats and actions, running away threats and behaviors and diagnoses – that "Sylvie's behavior at school did not put the school on notice of her serious emotional issues." App. 38a.

Without reference to the hearing officer's findings regarding Sylvie's unique and long-standing emotional issues, the district court finds "[t]here was abundant evidence that Sylvie's problems during her ninth grade year were not unique but were, in fact, common for this traumatic age." App. 38a. Without reference to the hearing officer's findings that Sylvie's homework avoidance issues arose from her disability and were found across settings, including when she was in France with her father, the district court found "[t]here is no evidence that Sylvie would not have progressed quite well at Dripping Springs if she had been in a placement other than with her mother." App. 38a. Contrary to the hearing officer's findings, and without any reference to the hearing officer's findings, the district court thus concluded "the undersigned does not see any *educational* needs that were not being met by Dripping Springs I.S.D." App. 39a (emphasis in original).

2. Findings regarding Elan School

After reviewing the additional evidence presented by Plaintiffs regarding Elan School, the district court found, contrary to the hearing officer's findings, that "[i]t is possible that Elan was, in actuality, the optimal setting for

Sylvie. The results certainly indicate that it was a good setting for Sylvie." App. 41a.[10]

However, the district court found that, even if Dripping Springs had failed to provide FAPE, Elan was not reimbursable because it was not the least restrictive environment for Sylvie. The district court found that "a private placement at public expense is appropriate only if a school district is unable to provide the necessary services to a disabled student in a public school." App. 42a (citing *Flour Bluff I.S.D. v. Katherine M.*, 91 F.3d 689, 691 (5th Cir. 1996), *cert. denied*, 519 U.S. 111 (1997). Thus, the district court held "[t]here were numerous less restrictive alternatives than Elan at Dripping Springs I.S.D. that Sylvie's parents refused to try. All of these intermediate, less restrictive alternatives were skipped over in Sylvie's move from Dripping Springs High School to Elan. As such, Plaintiff fails this prong." App. 42a.

D. Fifth Circuit Opinion

In an unpublished opinion, the Fifth Circuit affirmed the district court. The Appeals Court found that the district court utilized the appropriate "essentially *de novo*" standard of review. App. 2a. Nor did the Fifth Circuit find reversible error in the district court's finding that Elan was inappropriate and thus not reimbursable. App. 2a.

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[10] In fact, contrary to the hearing officer's concern that Sylvie's math disability would not be addressed at Elan, Sylvie successfully completed her math courses there, in preparation to attend college. It is of interest to note that when the school district conducted its first-ever psychological evaluation in preparing for this litigation, its psychologist ignored Sylvie's psychological processes, identified her as having "a learning disability in math" and recommended taking her out of math classes at Dripping Springs as a solution.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND/OR WITH DECISIONS IN OTHER CIRCUITS

A. The district court misapplied, and the Fifth Circuit affirmed, the standard of review in an IDEA matter.

The decision of the Appellate Court that the district court utilized the appropriate standard in reviewing the hearing officer's decision, on issues for which the district court received no additional evidence, is contrary to Supreme Court precedent as well as to decisions in other Circuits.

In *Board of Education of the Hendricks Hudson Central School District, Westchester County, et al. v. Rowley, by Her Parents, Rowley et al.*, 458 U.S. 176, 206 (1982), this Court cautioned courts reviewing state administrative proceedings:

> Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely

> because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

This Court held that "due weight" must be given to state administrative decisions because the federal courts do not possess "the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy," *Rowley*, 458 U.S. at 208 (quotations omitted).

Circuit courts have interpreted the "due weight" standard differently. For example, the Fourth Circuit holds that "[a]dministrative findings in an IDEA case 'are entitled to be considered prima facie correct,' and 'the district court, if it is not going to follow them, is required to explain why it does not.' " *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998) (quoting *Doyle v. Arlington County School Board*, 953 F.2d 100, 105 (4th Cir. 1991).

The Third Circuit similarly follows *Doyle*, holding that, if the district court chooses to depart from the state agency's rulings, it should provide some explanation for its departure. *See Carlisle Area School District v. Scott P.*, 62 F.3d 520, 527 (3d Cir. 1995), *cert. denied, Scott P. by and through Bess P. v. Carlisle Area School District*, 517 U.S. 1135 (1996) (citing *Doyle*).

The First Circuit finds that review of an administrative decision under IDEA "is to be something short of a complete *de novo* review of the state educational program." *G.D. v. Westmoreland School District,* 930 F.2d 942, 945 (1st Dist. 1001) (citing *Colin K. by John K. v. Schmidt,* 715 F.2d 1, 5 (1st Cir. 1983)). The First Circuit thus holds that "the court must recognize the expertise of an administrative agency, as well as that of school officials, and consider carefully administrative findings." *Westmoreland,* 930 F.2d at 946. Only then is the precise degree of deference left to the trial court. *Id.*

The Sixth Circuit gives more or less weight to an agency's determination depending on whether educational expertise is relevant to the decision. Specifically, the Sixth Circuit holds:

> administrative findings in an IDEA case may be set aside only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise, a fair estimate of [**16] the worth of the testimony, or both. A court should defer to the administrative findings only when educational expertise is relevant to those findings and the decision is reasonable. By so deferring, "due weight" will have been given to the state administrative proceedings.

Burilovich v. Board of Education, 208 F.3d 560 (6th Cir. 2000).

The Seventh Circuit recognizes ambiguity in the definition of "due weight", and notes that there may be differences in its review of IDEA cases depending on whether the district court takes evidence or acts merely as a reviewing court. But the Seventh Circuit finds: "One thing, at least, is clear, and it decides this case: we do defer, though of course not abjectly, to the view of the hearing officers as to what services a disabled child is entitled to under the IDEA." *Morton Community Unit School District No. 200 v. J.M.*, 152 F.3d 583, 588 (7th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

The Eighth Circuit, too, recognizes the necessity of giving "due weight" to an administrative hearing decision under IDEA. *See Strawn v. Missouri State Board of Education*, 210 F.3d 954, 958 (8th Cir. 2000) (when the district court failed to acknowledge or reference the "due weight" standard of review, and when, moreover, the record supports the administrative decision, the district court was reversed).

The Ninth Circuit instructs:

> The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

Gregory K. v. Longview School District, 811 F.2d 1307, 1311 (9th Cir. 1987).

Moreover, the Ninth Circuit gives increased deference to the hearing officer when her findings are "thorough and complete." *Adams v. State of Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999) (cite omitted).

The Eleventh Circuit holds that district courts must consider the administrative findings, but are free to accept or reject them. *Doe v. Alabama Department of Education*, 915 F.2d 651, 657, n. 3 (11th Cir. 1990).

The Fifth Circuit holds that, in IDEA cases, "the district court's review of the hearing officer's decision is virtually de novo." *Teague Independent School District v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

Pursuant to the Fifth Circuit's "virtually *de novo*" standard, without taking further evidence on the issue in *Sylvie M* and without reference to the administrative findings of fact, the district court reversed the administrative hearing officer's findings regarding an issue of services to which a disabled child is entitled under IDEA: whether the school district's program provided FAPE. This is clearly an issue involving the hearing officer's educational expertise. Petitioners contend that the record on the issue of FAPE supported the hearing officer's findings, and that her expertise should be given due weight. Instead, the district court substituted its own notions of sound educational policy, and gives no weight to the state administrative hearing officer.

B. The district court misapplied, and the Fifth Circuit affirmed, an incorrect standard in determining whether Sylvie received educational benefit from Dripping Springs School District.

The hearing officer found that Sylvie's IEPs were fatally flawed because they did not contain a necessary component (a psychological assessment) (App. 74a), and that her IEPs were deficient in several areas (including counseling, providing a meaningful plan to address her failure to complete class work and homework and addressing her lack of organizational skills). App. 74a-75a. Moreover, the hearing officer found that, "[c]onsidering Sylvie's intelligence and abilities, her pathetic grades indicate that she was not receiving an educational benefit." App. 78a.

This Court has previously discussed the question of when sufficient educational benefits under IDEA are provided. Without setting out a specific standard for all cases, the Court noted, first, that the program must be tailored to the unique needs of the student through her IEP. *Board of Education v. Rowley*, 458 U.S. 176, 181-82 (1982). Further, the Court noted that when a student is being "mainstreamed", or educated in the regular classroom of a public school system with supports and services as necessary, "the system itself monitors the educational progress of the child. . . . The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered to be "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act." *Rowley*, 458 U.S. at 203.

In making her findings, the hearing officer followed the parameters set out in *Rowley*. She determined that the programs could not be tailored to Sylvie's unique needs, as the most serious of those needs were not even identified by the school district. *See Rowley*, 458 U.S. at 181-82. And, in fact, she found the IEPs to be deficient in meeting Sylvie's unique needs, including her emotional needs. Moreover, she noted that Sylvie certainly had the capacity to pass her courses, but as a result of her inappropriate IEPs and the failure of the school district to remediate the disability interfering with her ability to do homework and class work, she was failing.

In contrast, the district court found that Sylvie was making educational progress because she scored well on standardized tests, and could have passed her classes if she did her homework. This is not enough of a showing to demonstrate educational progress for a student with

Sylvie's capabilities. This is especially true when Sylvie is unable to compete her homework due to disabilities which are not addressed in her IEP. If she remained on the same path at Dripping Springs, she would not have graduated. Thus, no matter how high her scores may be on standardized tests, she would not be "considered by our society to have been 'educated'." And, because Sylvie is a very bright young woman, she would have been acutely aware of her failure. The district court's opinion, and the Fifth Circuit affirmance, are contrary to *Rowley*.

C. The district court and Fifth Circuit erroneously held parents to a least restrictive environment standard in finding that Elan School was not appropriate.

After taking additional, uncontroverted evidence from parents as to Sylvie's program and progress at Elan, the district court appropriately found – contrary to the hearing officer's findings based on then-incomplete information – that Elan School was possibly the "optimal" placement for Sylvie. App. 41a.

But the district court then finds that, even if the school district had denied FAPE, Elan is not reimbursable because it is not the least restrictive setting. App. 42a. But the district court misapplies the rules which set out when a *school district* may place a child in a private setting. 20 U.S.C. § 1413(a)(4)(B). That is not what happened here. Here, petitioners contend that the school district failed to provide Sylvie with a free appropriate public education. Parents were therefore forced to place her unilaterally and seek reimbursement from the district.

This Court has held that when a school district fails to provide FAPE, parents are eligible for reimbursement of a unilateral placement so long as it is appropriate. *School Comm. of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369 (1985). And, "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.' " *Florence County School District Four v. Carter,* 950 F.2d 156, 164 (4th Cir. 1991), *affirmed,* 510 U.S. 7 (1993) (quoting *Board of Education v. Rowley,* 458 U.S. 176, 207 (1982)). Parents' unilateral placement is appropriate if it meets this standard, even if it does not strictly comply with all state guidelines. *Florence County School District Four v. Carter,* 510 U.S. 7, 13-14.

The Fifth Circuit erred in affirming a finding that Elan could not be appropriate because it was not the least restrictive environment. Essentially, the courts below find that when the school district fails to provide FAPE, parents must set their child up for repeated failures while trying successively more restrictive placements, or forfeit reimbursement. This theory does not square with Supreme Court precedent. In *Burlington,* this Court refused to bar a parent from reimbursement when the parent violated stay put by unilaterally placing a child during due process litigation. 471 U.S. at 372-74. The Court reasoned that such a bar would create an anomalous situation where "the parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate educational placement only be sacrificing any claim for reimbursement." *Id.* at 372.

The courts' finding is also contrary to opinions in other Circuits, which have looked to the intent of IDEA's least restrictive environment (LRE) mandate. The purpose behind IDEA's LRE mandate is found in Congress' finding, in enacting the statute, that "1,000,000 of the children in the United States were excluded entirely from the public school system and did not go through the educational process with their peers." 20 U.S.C. § 1400(c)(2)(C). Thus, the Seventh Circuit found in rejecting a mainstreaming requirement for unilateral placements: "the mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally impaired children and their non-disabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums." *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education,* 41 F.3d 1162, 1168 (7th Cir. 1994).

Similarly, the Third Circuit recently rejected the proposition that IDEA requires a student to prove that all public placements are inappropriate before private unilateral placement is reimbursable. *Ridgewood Bd. of Ed. v. N.E.,* 172 F.3d 238 (3rd Cir. 1999); *see also Warren G. v. Cumberland County School District,* 190 F.3d 80, 84 (3rd Cir. 1999). The Sixth Circuit has also specifically held that a failure of a private placement to satisfy the IDEA's mainstreaming requirement does not bar reimbursement for the costs of that placement. *Cleveland Heights-University Heights City School District v. Boss,* 144 F.3d 391 (6th Cir. 1998).

The Fifth Circuit rule is inconsistent with other Circuits which have considered the matter, is inconsistent with the purposes behind IDEA's LRE mandate, and cannot be squared with this Court's decisions in *Carter, Burlington* and *Rowley.*

II.

THE QUESTIONS PRESENTED ARE IMPORTANT

The questions presented here have a significant impact on the education of children with disabilities who are not appropriately served by their local districts.

First, the court below ignored the lengthy and well-reasoned opinion of a state administrative hearing officer in the field of education on the issue of FAPE, and instead substituted its own lay opinion that a seriously emotionally disturbed child was failing because she just refused to do her homework. After all, the court noted that this child did not engage in bizarre behaviors at school, and appeared to her teachers to present well, even to be "sparkling" and "stylish". The court simply did not fully grasp the educational implications of Sylvie's serious emotional disturbance. Every expert – including the school district's own expert retained to testify at the hearing – who assessed her found her to be seriously emotionally disturbed, to have been so disturbed for quite some time, and that disability interfered with her educational progress. The hearing officer, presumably knowledgeable in the education field, understood Sylvie's disabilities, her capabilities, and the deficiencies of her educational program. She ruled accordingly.

If the Fifth Circuit opinion stands, courts will have free rein to substitute their judgment of sound educational policies, and of the special needs of disabled children, for the opinions of educators. This will have an especially harsh impact on children like Sylvie, who "present well" to the lay person, and often even to teachers and parents.[11]

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[11] For example, one of Sylvie's diagnoses was dysthymia. Dysthymic disorder is defined as "a specific depressive disorder

Second, the Fifth Circuit's finding that a child can receive educational benefit because she is bright enough to score well on standardized tests and to absorb enough information to pass tests, despite the fact that she is failing classes, is disastrous for children who have above average intelligence but have a learning disability or emotional disability that negatively impacts their educational success. These children, as was Sylvie, would be denied the help they need to succeed in school. And because they are bright, they will be well aware of their failures, impacting on their self-esteem and perhaps their behavior. Only those children whose parents can afford to pay for private placements would have the opportunity to graduate. This finding is absolutely contrary to IDEA's mandate that individualized education programs, meeting the unique needs of each eligible child, be developed.

Finally, the Fifth Circuit's finding that, even when a school district fails to provide FAPE, parents are not eligible for reimbursement of a unilateral placement unless they have first tried every less restrictive placement that a school district might offer, would effectively eliminate the right to unilateral withdrawal recognized in *Burlington*. It would also effectively eliminate IDEA's timeliness mandates. If a school district did not get FAPE

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characterized by a constant and chronic disturbance of mood involving either depression or irritable mood. . . . Often, these youth are subject to constant demands that exceed their capabilities, leading to a constant sense of failure and, ultimately, chronic depression or dysthymia. Too often, this treatable disorder gets reinforced when it is seen by teachers, parents, and others as 'lack of motivation'." Accardo, Pasquale J., M.D., et al., *Dictionary of Development Disabilities Terminology*, Paul H. Brookes Publishing Co., 1996. Indeed, this is exactly what happened to Sylvie at school, despite the diagnoses of dysthymia, emotional disturbance, sequencing disability and ADD.

right the first time, it could just try again, repeatedly, until the child quit or otherwise left the school system.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED AND FILED MAY 5, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-50572

SYLVIE M., by next friend
Diane R.; Diane R.,

Plaintiffs-Appellants

versus

BOARD OF EDUCATION OF
DRIPPING SPRINGS
INDEPENDENT SCHOOL DISTRICT;
ET AL

Defendants

BOARD OF EDUCATION OF
DRIPPING SPRINGS INDEPENDENT
SCHOOL DISTRICT

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(A-97-CV-314)

(Filed May 5, 2000)

Before WIENER, BENAVIDES, and PARKER, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants Sylvie M. and Diane R. (collectively, "Appellants") ask us to reverse the district court's reversal of the State Education Hearing Officer's decision that the defendant-appellee ("School District") did not provide a free appropriate public education ("FAPE"), and to reverse both the Hearing Officer's and the district court's rulings that Appellants are not entitled to reimbursement for residential placement of Sylvie at the Elan School because it was not appropriate for her disability. Appellants' claims are grounded, alternatively, in the Individuals with Disability in Education Act ("IDEA") and the Rehabilitation Act. We affirm the district court's dismissal of Appellants' actions.

After carefully reviewing the material facts at issue in this case, as reflected by the record and as related in briefs of counsel, and applying the appropriate law to those facts, we conclude that the district court did not commit reversible error in holding, under the appropriate "essentially *de novo*" standard of review, that the Individual Educational Plan ("IEP") provided by the school district was in compliance with the appropriate procedures and was reasonably calculated to enable Sylvie to receive educational benefits. Neither do we find reversible error in the district court's determination that Sylvie's unilateral residential school placement by her parents was inappropriate and thus not reimbursable. *See Cypress-*

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[*] Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th cir. 1997); *see also Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

We conclude that the arguments advanced on behalf of Appellants are insufficient to justify reversal of the district court's judgment, which, in all respects, is

AFFIRMED.

APPENDIX B – OPINION AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, DATED AND FILED MAY 5, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SYLVIE M. b/n/f DIANE R. §
Plaintiff, § A-97-CA-314 SHC
v. §
BOARD OF EDUCATION OF DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT, TONY WIEHL, DEBRA MILLER, PAUL WATKINS, GLENN HECKERMANN, PAM PETERSON, PAT SIEDERS, MIKE FIGER, LENNY JASINSKI, VICKIE FULLER, JAMES ROSEBROCK, CHARLOTTE EVANS, TONI CARTER, HAYS-BLANCO SPECIAL EDUCATION COOPERATIVE, and SHARON EAST §
Defendants. §

OPINION

(Filed May 5, 1999)

Before the undersigned are the Administrative Record in this Case filed February 26, 1999 (15 volumes) (Doc

#55); Plaintiff Sylvie M's Additional Brief and Evidence filed March 5, 1999 (Doc. #56); Defendant's Motion for Judgment on the Record and Supporting Brief filed March 8, 1999 (Doc. #57); Plaintiff's Reply Memorandum filed March 26, 1999 (Doc. #60); Defendant's Response and Motion to Strike filed March 29, 1999 (Doc. #61) and Plaintiff's Response to the Motion to Strike filed April 13, 1999 (Doc. #62). The Motion to Strike is denied and the Court has considered all the evidence in reaching its decision.

BACKGROUND

This case presents the issue of who should bear the cost of educating a troubled high school student when her parents decide to unilaterally transfer her from her public high school to a private, restrictive residential school for students with behavorial problems. Plaintiff, Sylvie M., by next friend Diane R. (Sylvie's mother) bring this suit under the Individuals with Disabilities [sic] Act (IDEA) seeking to require Defendant, Dripping Springs Independent School District (DSISD), to pay for the placement of Sylvie M at the Élan School, a private residential special education school in Poland Spring, Maine.[1]

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[1] Plaintiff brings related claims under the Rehabilitation Act. The regulations promulgated under Section 504 of the Rehabilitation Act provide that compliance with the IDEA's procedures satisfies the requirements of Section 504. Since the relevant federal regulations and case law indicate that requirements of the Rehabilitation Act may be satisfied through compliance with IDEA, it appears these separate Acts create a nearly identical substantive right to receive a free appropriate public education. As such, the claims will be addressed jointly.

Defendant asserts that it is not required to pay for Sylvie M.'s unilateral placement in the Élan school because the education it offered to Sylvie M. satisfied the minimum educational standards set out in the IDEA, and thus the removal of Sylvie from Dripping Springs I.S.D, was not required. For that reason, Dripping Springs I.S.D. argues that Sylvie's tuition at Élan (paid by Sylvie's parents) is not recoverable from the school district.

FACTS

Plaintiff, Sylvie M, was diagnosed as learning disabled in sixth grade and she began receiving special education services at that time. Sylvie is an intelligent girl whose problems are in the areas of short attention span, poor handwriting, becoming discouraged easily, failing to accept responsibility for her actions, and, most of all, not completing homework assignments. Sylvie also has a math disability, which first surfaced in fourth grade and was diagnosed in the sixth grade.[2] Sylvie was later diagnosed as having Attention Deficit Disorder (ADD) and was also, after most of the events giving rise to this suit, classified as seriously emotionally disturbed.

Sylvie's parents are divorced and Sylvie resided with her mother during the school year. Sylvie is an only child who always received a lot of attention and interest from

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The undersigned notes that Plaintiff's claims under 42 U. S. C. § 1983 and all claims raised against the individual defendants were previously dismissed.

[2] Sylvie's mother indicated at the hearing that she also was impatient about math and "very bad in math."

her parents, especially her custodial mother. Despite this interaction, when Sylvie reached middle school, she began lying to her mother about school work and whether assignments had been completed. Sylvie's mother was highly involved in the educational process and took homework (and Sylvie's failure to complete it) very seriously and frequently consulted with Sylvie's teachers. Sylvie's father lives in Paris, France, where Sylvie spent the majority of her summers. In the summer between seventh and eighth grade, Sylvie's parents decided that she would reside with her father for the eighth grade school year and attend school in Paris. The same problems arose at the Paris school and with Sylvie's father, namely Sylvie continued to lie about school assignments and failed to complete assignments. In March, 1995, Sylvie swallowed a quantity of aspirin, was rushed to the hospital, and her stomach was pumped. This incident was the first in a series, all of which occurred close in time to report cards or interim reports from schools.

On March 22, 1995, Sylvie returned to the United states and reenrolled in the Dripping Springs I.S.D. Sylvie's school counselor, Bridget Cave, was told about the problems in France and the suicide attempt. Sylvie's Admission, Review, and Dismissal Committee (ARD) approved content mastery classes for one hour a week. The ARD committee, including Sylvie and her mother, believed Sylvie to be adjusting fairly well as of May 4, 1995. Dripping Springs I.S.D. did not further evaluate Sylvie to determine if she needed additional services or had additional disabilities.

During the time Sylvie was in Paris, her mother remarried. Although Sylvie's relationship with her new step-father, Ron, had previously been amicable, the relationship quickly deteriorated after Sylvie's return from Paris, partially because Ron began to take an active role in Sylvie's life, including ensuring she completed homework.[3] When Ron tried to help Sylvie with her homework, she resisted and lied about completing homework and other household chores. Sylvie was jealous of Ron's place in Sylvie's mother's life and home. Sylvie's lying was a major point of contention between her and Ron and Sylvie's mother. On May 17, 1995, Ron spanked Sylvie. Sylvie went to school the next day and accused her stepfather of physically abusing her. Although Sylvie's mother later characterized Sylvie as being "caught out" as falsely claiming that she was abused, there was evidence that Ron slapped Sylvie quite hard on her right leg, leaving a handprint bruise. While this did not rise to the level of "abuse," school officials, when shown the bruise by Sylvie, were required to report it to Children's Protective Services. CPS duly investigated and later dismissed the charge. After family counseling, it was decided that Ron would not handle Sylvie's discipline, leaving that task solely to Sylvie's mother.

Sylvie's dislike of Ron increased and she threatened to commit suicide if her mother did not leave Ron. Sylvie's mother informed Sylvie's school counselor, Ms. Cave, about the suicide threat. Sylvie was then placed by her mother at Shoal Creek Hospital, where she remained until after the end of the school year. During her treatment at Shoal Creek, Sylvie repeatedly expressed the desire that she not have to return home and expressed her hatred and jealousy of Ron and her problems in dealing with her mother's mood swings. A treating psychiatrist, Dr. Ceballos, evaluated Sylvie and stated if she continued with her desire not to be at home with her family, he would recommend residential placement.

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[3] Sylvie's mother is a nurse who was apparently working the evening shift at that time. Ron, who had no biological children, took over supervising Sylvie in the evenings.

Sylvie suffered serious issues related to her father's sexual orientation and her mother's remarriage. Sylvie remained at Shoal Creek for two weeks. She was diagnosed as having major depression, dysthemia, parent-child conflict, and attention deficit hyperactivity disorder (ADHD). Anti-depressant medication and ritalin were prescribed.

Over the summer, Sylvie continued in private therapy with Dr. Ceballos. Ms. Cave and the Dripping Springs I.S.D.'s ninth grade counselor, Dr. Evans, discussed Sylvie's progress with Dr. Ceballos. Before entering ninth grade (the first year of high school), Sylvie's mother informed two Dripping Springs I.S.D. employees charged with IDEA issues about Sylvie's problems. An ARD was convened to address Sylvie's school year (an ARD Sylvie also participated in) and individual and group counseling was recommended as well as content mastery. The group counseling (1/2 hour per week) began soon thereafter and Sylvie willingly participated and became a leader in the group. Sylvie was given the opportunity to go to the group counselor for individual counseling if she wished to do so. At that time, Sylvie appeared to be adjusting well to Dripping Springs High School.

Sylvie passed all of her classes the first six weeks. Sylvie's class participation was very good during this time. Sylvie, however, had failing progress grades the second six weeks. This was primarily because she did not hand in any homework. There was repeated and undisputed evidence that it is very common for ninth graders to have trouble adjusting to high school and that students' grades and adjustment generally improve noticeably as they advance grades during their high school years.

Over Thanksgiving, Sylvie's mother received a progress report on the third six weeks which showed that Sylvie was still failing to complete classwork, homework, and projects. Sylvie and her mother argued. Sylvie later told her mother she had taken an overdose of aspirin and her mother rushed her to Shoal Creek Hospital, where Sylvie's stomach was pumped. During this time period or before, Dr. Ceballos had told Sylvie's mother that she needed to step back and let the school handle the homework issue.

Sylvie's mother told school officials about the incident the following Monday and met with a counselor and the principal, Dr. Rosebrock. During this meeting, Sylvie's mother expressed concern over Sylvie and also told about numerous stresses and traumas in her (the mother's) work and personal life. Sylvie was then referred to the school's Campus Action Program (CAP), which assists students in crisis. Vicki Fuller, a ninth grade regular education counselor (substituting for Dr. Evans) called Sylvie in for a one-on-one conference Monday afternoon. Sylvie's appearance surprised Ms. Fuller because Sylvie did not look at all like a depressed child or a child in conflict. Sylvie told Ms. Fuller that she had only taken four Tylenol, knew it wouldn't hurt her, and had done it and told her mother about it so her mother would stop arguing with her over her report card. Ms. Fuller had Sylvie sign a "Stay Alive Contract." According to testimony at the hearing, such a contract is a common, indeed automatic response to threats of suicide or suicide attempts even if the threat is not considered to be serious. The degree of follow-up on these contracts relates to the perceived seriousness of the risk. Despite her threats, Sylvie was not seen as a high risk for suicide. Rather, she was seen as using threats of suicide as emotional blackmail against her mother. In this case, since Sylvie's mother disclosed to the school Sylvie's actions, it was obvious that Sylvie's family was aware of the incident. As such, there was believed to be no need to disclose the suicide contract to Sylvie's mother.

Sylvie's first individual counseling session occurred that Tuesday with Sandy Gravenor, a special education counselor. After the session, Sylvie told Ms. Gravenor that she had took [sic] the aspirin only to get her mother's attention and said she didn't really want to kill herself. Sylvie indicated she liked Shoal Creek. After the session, Ms. Gravenor was of the opinion that Sylvie was not a suicide threat and that her problems emanated from a conflicted relationship with her mother. Sylvie also agreed for Ms. Gravenor to tell all of her teachers about the suicide gesture so they were aware that some problems were occurring in Sylvie's life. At some point, Sylvie also indicated that she was considering living in a foster home and she asked Ms. Gravenor how she would go about being placed in a foster home. Ms. Gravenor checked in with Sylvie on Wednesday and checked with Vickie Fuller on Friday. Ms. Gravenor stopped by at least once a week to check on Sylvie through the Christmas break. Ms. Gravenor perceived Sylvie to be experiencing similar problems as many other freshman and that her ninth grade experience was not atypical. Ms. Gravenor thought Sylvie had a certain uniqueness, however. Ms. Gravenor believed that it could "break her spirit" to be forced to conform. Ms. Gravenor saw no problems with Sylvie being able to make friends and she believed that Sylvie was very "stylish." Ms. Gallegos believed that Sylvie would benefit from therapy. The purpose of the study skills class added during her second semester was to try to diffuse some of the home tensions caused by Sylvie's failure to turn in homework.

During this time, Sylvie may have continued to see her private psychiatrist, Dr. Ceballos and the family also received counseling from a Shoal Creek psychologist, Charlotte Cooper. However, her compliance with her medications was sporadic at best and, on the advice and encouragement of her parents, she ultimately stopped taking her medication in December, 1995. Sylvie was ultimately diagnosed as having a primary disability of emotional disturbance (bipolar disorder) with a secondary disability of learning disability (the ADHD and math disabilities).

During this time period, Sylvie was being verbally harassed by a fellow student. This student, who was male, repeatedly asked if Sylvie was a "dyke" and otherwise harassed her. There was no physical harassment. Sylvie asked her mother not to do anything about it because it would only get worse if she complained. Sylvie's mother reported the harassment to Mr. Rosebrock but was unable to identify the full name of the perpetrator and refused to allow Mr. Rosebrock to discuss the situation with Sylvie. This prevented Mr. Rosebrock's [sic] from investigating and resolving the harassment. Sylvie's mother ultimately wrote a letter to the boy's parents which contained certain insults and allegations about them and their son.

On December 8, Sylvie's three year review was completed. The educational diagnostician, Toni Carter, was aware of Sylvie's recent suicidal gesture and her treatment at Shoal Creek. Ms. Carter described Sylvie as a "sparkling" person. Sylvie discounted the suicide threat as a parental dispute and Ms. Carter did not see Sylvie as a suicide risk. Ms. Carter determined that Sylvie, although not performing to her academic potential, was receiving educational benefit. Sylvie's math disability was again recognized and Ms. Carter recommended that she continue to receive content mastery classes, especially in math, and find a peer tutor for math. Ms. Carter knew that Sylvie was diagnosed as suffering from bipolar disorder and ADHD. However, the testing did not demonstrate any significant emotional or behavioral deficits.

Sylvie was not referred for further psychological testing. The primary reason Sylvie was not referred is that she did not act like she was emotionally disturbed at school and it was believed that Sylvie's private psychiatrist, Dr. Ceballos, was addressing any problems and he was likely in the best position to report on Sylvie's psychological health. Ms. Carter recommended that the January ARD address Sylvie's emotional condition and, if it was decided that psychological testing was appropriate (as opposed to merely consulting Dr. Ceballos), they could obtain Sylvie's mother's permission for psychological testing at that time, since Sylvie's mother was a member of the ARD.

Sylvie failed two classes for the fall semester, World History and Health. Sylvie's History and Health teachers indicated that Sylvie's failure to turn in homework seriously damaged her final grade.[4] However, she often did well on quizzes and participated actively and intelligently in class discussions. Sylvie's behavior in these classes was social and appropriate and neither teacher noticed anything out of the ordinary. Both teachers were aware that Sylvie attended Content Mastery and they encouraged her to utilize this program. Both teachers were also aware that her mother had reported that Sylvie suffered from mood swings and had made a suicide threat in November of 1995. Both teachers believed that despite her failing grades, Sylvie received educational benefit in their classes and was capable of passing their classes.

Sylvie's ARD met on January 16, 1996, at which it was Sylvie's failure to turn in work was discussed [sic]. The ARD decided that further psychological testing was unnecessary due to Dr. Ceballos' relationship and knowledge of Sylvie and that fact that Sylvie's mother had invited one of her and Ron's friends, a psychologist, to live with them for a short time and help with Sylvie.[5] The ARD, on the recommendation of Sylvie's mother, decided it would be more effective to ask Dr. Ceballos to address whether Sylvie should be classified as emotionally disturbed and Ms. Carter sent him a letter and some of Sylvie's records. Sylvie's IEP was also adjusted in an effort to meet her needs.

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[4] Sylvie made an 81 on the final exam in Health and still failed because of her abysmal homework record.

On January 29, 1996, Sylvie's mother learned that Sylvie was failing three classes because she was not completing assignments or turning in homework. During this period of time, Sylvie and her mother argued frequently. On the night of February 14, 1996, Sylvie stormed out of her house about 7:30 p.m. as a result of an argument with her mother about Sylvie's smoking and Sylvie's door having come off its hinges due to her repeated slamming of the door. Because the door was off its hinges, Sylvie could not close or lock it. Sylvie returned three to four hours later. Although this was characterized by her mother as a "running away" incident, the time lapse is insufficient to truly call it that. The next day, Sylvie's mother called Ms. Fuller and asked her to recommend private counselors. Ms. Fuller made an appointment for Sylvie at the Scheib Center in San Marcos. Ms. Fuller called Sylvie in for a counseling session on February 16 to follow-up on the incident. Sylvie's belief at that time was that her family situation was "hopeless." She did not refer to any school problems (in fact she apparently felt favorable about school) but rather focused on the problems with her mother and step-father.

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[5] This friend, Dr. Alfred Jones, was between apartments for a few months and agreed to come help out the family.

On February 16, Sylvie's father contacted Ms. Fuller from Paris. Sylvie's father and Ms. Fuller both perceived Sylvie and her mother's relationship to be in "crisis." They discussed Sylvie's home environment and whether Sylvie should be placed in a residential boarding school, near Dripping Springs if possible The San Marcos Baptist Academy was discussed as a possible placement but no decision was reached. Ms. Fuller did not recall him asking about any need for placement in a behavioral or psychological treatment facilities [sic]. The funding of the placement was not discussed.[6] Ms. Fuller's understanding was that Sylvie's father believed it would be in Sylvie and her mother's best interests to be separated because Sylvie was so disruptive at home and Sylvie's mother had numerous other crises in her life in addition to Sylvie's misbehavior.

On February 22, 1996, the school received the report from Dr. Ceballos, which indicated that Sylvie suffered from bipolar disorder, depression, and ADHD and that she could be classified as emotionally disturbed. A meeting was planned for after spring break to address any modifications to the IEP. On February 27, Sylvie's mother called Ms. Fuller and told her that Sylvie threatened to commit suicide if made to do her homework. Sylvie's mother was very distressed during the phone conversation and Ms. Fuller testified that, because she knew Sylvie well and did not believe her to be suicidal but rather using it as a threat, she was actually more concerned about Sylvie's mother's mental health. Sylvie's mother asked that she not be asked to ensure that Sylvie completed her homework at home and also asked that Ms. Fuller communicate her problems with Sylvie and homework to Sylvie's teachers.

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[6] Sylvie's father recalled that they discussed cost and Ms. Fuller stated she had heard cost could be up to $1500 a day.

On March 1, Ms. Fuller met with Sylvie's teachers. in an effort to prevent further conflicts over homework, it was decided that Sylvie would receive tutoring during classes and after school and Sylvie's mother would receive weekly reports concerning Sylvie's progress. At that time, none of the teachers expressed concern about Sylvie's behavior other than Sylvie's refusal to complete homework and her excessive socializing ("goofing off") during some of her classes. All of the teachers believed that Sophie [sic] was learning despite her grades. All of the teachers agreed to work with Sophie [sic] to resolve the problems. One-on-one tutoring was to be offered in geography, one of Sophie's [sic] weaker subjects. Although Sophie [sic] was also doing poorly in Theater Arts, Sophie [sic] believed her Theater Arts teacher was gay and did not like him because he gave her bad memories of her father. For that reason, no remediation was offered in that class and she was going to be permitted to substitute a study hall for that class. It was believed that this new program would resolve Sophie's [sic] school problems.

Ms. Fuller met with Sophie [sic] on March 1 and told her about the new program. Ms. Fuller told Sophie [sic] that she was "cutting off her nose to spite her face" by refusing to do homework as a way of getting back at her mother. Sophie [sic] indicated that this was possible and stated that she was receptive to the new program.

On March 4, Ms. Fuller met with Sylvie's mother to explain the new program and also met with Sylvie to check her progress. Sylvie was happy during that counseling session because she perceived her mother to be giving her more freedom.

On March 6, Sylvie ran away. Her father came from France to assist in the search, which was highly publicized. Four days later, she was found by her father (with the assistance of one of Sylvie's friends) on Guadalupe Street in Austin near the University of Texas ("the Drag"). Her head was shaved and she wore black makeup and bizarre clothing. She stated her name was Karma. She was very resistant to going back to her mother's house[7]. For that reason, her father agreed to take her back to where he was staying in Austin. Sylvie refused to enter her mother's house and only returned to briefly pack her belongings prior to her departure for Élan.

Sylvie's parents informed Ms. Fuller that Sylvie had been found. Ms. Fuller was unable to immediately convene an ARD meeting because spring break was that week. Sylvie's parents enrolled her in Élan on March 14, before the end of spring break, and notified Ms. Fuller. Sylvie's parents indicated at that time that they were going to seek at least partial tuition reimbursement. Ms. Fuller told them she thought it was unlikely that they would be reimbursed because the educational resources at Dripping Springs I.S.D. had not been fully explored. At that time, a family preservation meeting was scheduled for the next day with a Hays County Family Preservation counselor.[8] Ms. Fuller also stated to Sylvie's parents that she disagreed with the placement because she believed that even if Sylvie needed residential placement to separate her from her mother, it could be accomplished closer to home. Ms. Fuller saw the enrollment in Élan as a way of not dealing with the conflicts between Sylvie and her mother.

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[7] Sylvie's father testified that she was resistant to going back to school, not to her mother's house. Sylvie was on spring break that week.

On March 18, Dripping Springs I.S.D. notified Sylvie's mother that Sylvie was failing three courses. Her failing these courses was primarily attributable to Sylvie's failure to turn in homework. On April 25, 1996 (some two months after her placement) Sylvie's private psychologist, Dr. Ceballos, stated in a letter that "Élan would provide the appropriate structure for Sylvie's education."

Sylvie was by then far outside the geographical boundaries of the Dripping Springs I.S.D. As such, she was unavailable for a psychological test unless Dripping Springs I.S.D. was willing to send a psychologist to Maine. Ultimately, as the litigation progressed, Dripping Springs I.S.D. sent Dr. Keene to Maine in September, 1996 to examine Sylvie.

The Élan School is a private year-round special education, special purpose school for residential students located in Poland, Maine. Élan specializes in older children who are behaviorally impaired. No mood-altering medications (such as medications for bipolar disorder) are allowed. Élan's program is one of behavioral modification. Élan is highly structured with clearly set goals and levels through which the students progress. Students participate in Élan's program and work in and around the school during the day and attend four hours of academic classes at night.[9] According to evidence at the hearing, Élan uses a "confrontational" model with verbal assaults by peers on fellow students who refuse or fail to conform. Sylvie has testified via affidavit in this proceeding that she did not feel adversely "confronted" by her peers or staff at Élan. However, Dr. Keene determined in September 1996 that Sylvie's unwillingness to "confront" other students was a stumbling block to her advancement and that she had decided to cooperate with the program out of fear of being singled out for group confrontation. A progress report by an Élan Director indicates that Sylvie was "confronted" by numerous students during her final days at Élan due to Sylvie's dropping of responsibilities and avoidance of situations. While Dr. Keene approved of Élan for some types of students, he felt the placement was highly inappropriate for Sylvie's needs. Dr. Keene testified that Sylvie was not in need of residential placement for academic reasons.

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[8] This meeting did not occur.

When Sylvie was tested in September of 1996 by psychologist Greggus Yahr, he found that Sylvie was on par with her peers academically except in the areas of deductive reasoning. Mr. Yahr indicated that Sylvie had low esteem and felt she "couldn't do it" and so gave up on homework very quickly. Mr. Yahr felt that Sylvie had limited emotional coping skills which caused difficulties with the parent-child conflict. Mr. Yahr felt that the Élan placement was appropriate. However, some of Mr. Yahr's conclusions were based on the statements of Sylvie's father that Sylvie ran away because she didn't want to return to school. The great weight of the evidence indicates that Sylvie ran away because she did not want to live with her mother anymore.

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[9] In the summer, they have two hours of classwork a night.

Students at Élan do not have homework. Although some of the staff are licensed teachers, there are few to no professionals in the area of psychology. Élan is not licensed as a residential treatment facility by the state of Maine but rather is licensed as a special purpose private school. Sylvie did not receive any psychological counseling while at Élan and she also did not take any medication. Élan costs approximately $40,000/year. Sylvie did very well in the program, graduating in December of 1998 and she has returned to Texas and is apparently now attending college. The total cost of Sylvie's placement was $113,155.16. This amount includes payments for tuition, related services, and board and care.

Sylvie's parents requested that Dripping Springs I.S.D. pay for Sylvie's placement at Élan. On April 30, 1996, the ARD met and, based on Dr. Ceballos' report, determined that Sylvie was emotionally disturbed. Sylvie's mother apparently made it clear at the April 30 ARD that Sylvie was not returning to Dripping Springs I. S. D. and that the meeting was, in her mind, solely to qualify Sylvie for residential placement at Élan. The ARD ultimately refused to pay for the Élan placement. Rather, it set out an IEP for the rest of the year that recommended psychological and orthopedic evaluations (which never occurred because Sylvie was already at Élan) and added a behavior management plan. If Sylvie had returned, an ARD would have convened to do a temporary IEP based on the new situation.

In Dripping Springs I.S.D.'s opinion, Sylvie's placement was non-academic because the placement was primarily to resolve out-of-school family conflicts. The school officials on the ARD committee uniformly agreed that the purpose of the placement was to separate Sylvie from her mother and that placement at Élan was unnecessary and not the least restrictive environment for Sylvie. The school district also indicated that it did not feel it had exhausted other in-district alternatives to residential placement, such as additional resource classes, self-contained classes, and day placement under contract. The school district indicated at the hearing that it would not voluntarily pay for a placement in a residential facility such as Élan unless all other academic alternatives had been exhausted.

After the ARD in April, 1996, Sylvie's IEP for 1995-96 (her ninth grade year) included Inclusion English, a study skills class, behavior management, and a minimum of two hours of counseling a month. The amount of counseling could be greater if the counselor felt more time was needed. The IEP for the following year (a year in which it is clear that Sylvie's parents apparently had no intention of enrolling Sylvie in Dripping Springs I.S.D.) dropped the English and study skills components. However, these components could have been added as electives if Sylvie had ever returned to Dripping Springs I.S.D. and she also may have been eligible for additional services had she returned. There was testimony that additional services could have been provided to Sylvie had she returned.

A follow-up ARD was held on May 13, 1996. Ms. Carter left the meeting prior to its conclusion because she was distressed that Sylvie, who had been diagnosed as bipolar, was being given no medication despite Ms. Carter's belief that she needed it, and she was still "mopping floors" at Élan because Sylvie's mom had refused Sylvie's letters of "confession, guilt, and remorse." Sylvie's mother indicated that Sylvie didn't "get" the idea of positive peer pressure. Ms. Carter strongly disagreed with Sylvie's mother about whether Élan was a proper placement. Ms. Carter left the meeting because she felt any further discussion with Sylvie's mother would be futile.

Dripping Springs I.S.D. and Sylvie's parents had widely varying views of Sylvie. Dripping Springs I.S.D. saw Sylvie as an intelligent child with minimal disabilities who chose not to complete school work due to lack of motivation and serious conflicts with her mother. Her behavior was also seen as not unusual for, a ninth grader, a highly traumatic and transitional year for many students. Sylvie's performance on standardized achievement tests during her entire school career with Dripping Springs was, with the exception of math, at or above her grade level. The school believed that Sylvie was learning despite her grades and concluded that the failing grades were a result of her unwillingness to complete assignments.

In contrast, Sylvie's parents viewed her as a clinically depressed and disruptive child who threatened and attempted suicide, habitually lied, had trouble making friends, had screaming arguments at home, and regularly failed to complete school work.[10] Sylvie's behavior at school (other than her failure to complete assignments) far exceeded her behavior at home. Sylvie's intelligence apparently allowed her to "present" excellently when she wished to, which masked her serious emotional disturbance. Sylvie also had deep rooted conflicts with her mother and stepfather, as she did not with school counselors, teachers, or officials.

On July 22, 1996, Sylvie's parents requested a due process hearing to appeal Dripping Springs I.S.D.'s refusal to pay for Élan. In preparation for the hearing, Sylvie was evaluated by two psychologists, one for each side. The psychologists tested Sylvie and found her to have a high I.Q. (122-125). Sylvie was found to have a learning disability in math. Except for math, Sylvie was at or above grade level in every subject. Both psychologists felt that Sylvie had been depressed for at least two years and had problems paying attention (ADD), but neither thought her to also be hyperactive (ADHD). Both psychologists agreed that Sylvie's primary need was for counseling at some point. The psychologists, predictably, disagreed as to the propriety of the placement at Élan, with Mr. Yahr recommending placement at Élan and Dr. Keene stating that Élan was not a good placement and recommending individual, family, and group therapy, with carefully supervised medication if she was willing. Dr. Keene indicated that even though Sylvie had been failing certain classes, it was clear from her scores on achievement tests that she was still learning regardless of her grades. Dr. Keene also believed that Sylvie's emotional disturbance had little significant impact on her educational achievement. While Dr. Keene stated that Élan was a good placement for oppositional/defiant teenagers and for those who used and abused drugs or were otherwise antisocial, Dr. Keene believed it was the exact opposite of what Sylvie needed.

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[10] Unlike the hearing officer, the undersigned does not, believe that the school district "blamed" Sylvie's mother for Sylvie's problems. Rather, the evidence is clear that Sylvie's mother was deeply involved with Sylvie and tried very hard to help and understand Sylvie. Regardless, Sylvie's relationship with her mother remained troubled.

The due process hearing was held November 12-16, 1996 before a Special Education Hearing Officer for the State of Texas. The hearing officer issued her findings on January 10, 1997. The hearing officer found that Dripping Springs I.S.D.'s IEP was inadequate because it failed to recognize or take into accounts [sic] Sylvie's serious emotional disturbance. However, the hearing officer also found that the placement at Élan was not appropriate because it was not the least restrictive environment. As such, the hearing officer concluded that Dripping Springs I.S.D. was not required to pay for Sylvie's placement at Élan. The hearing officer did find that the school was required to offer one hour a week of individual or family therapy, retroactive to January 1996.

Defendants allege that the hearing officer was correct in determining that Élan was an inappropriate setting. Defendants assert that DSISD has a full continuum of placements available to serve Sylvie's needs and that residential placement at Élan violated the rule of "least restrictive placement." DSISD argues that Sylvie's problems resulted from conflicts with her mother and stepfather and do not justify holding the school district liable for a residential placement.

Plaintiff responds that her markedly improved performance at Élan disproves the school district's argument that it was adequately meeting her needs. Plaintiff argues that her failing grades at DSISD and her far higher grades at Élan show that is meeting her needs. Plaintiff asserts that the hearing officer was incorrect in determining that Élan was not an appropriate educational setting and that Sylvie's performance at Élan establishes that it is the right setting for her.

Defendants reply that the hearing officer's findings are entitled to due deference but that the officer erred in finding that DSISD was not providing a free appropriate public education (FAPE). Defendants assert that Sylvie was provided an appropriate individual Education Plan (IEP) and that Élan is not the least restrictive environment. Defendants conclude by asserting that even if a FAPE was not provided in the past, Sylvie's parents rejected a settlement offer in September of 1996 that would have provided Sylvie with the necessary skills to succeed in school.

LEGAL STANDARDS

In 1975, Congress passed the Education of the Handicapped Act ("EHA"), now known as the Individuals with Disabilities Education Act (IDEA) following various amendments. The purpose of this legislation is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c).[11]

IDEA is designed to encourage states to develop special education programs for disabled students. IDEA mandates that a state must provide all disabled children a "free appropriate public education" (FAPE) in return for federal funding. 20 U.S.C. § 1412 (1). The term 'free appropriate public education' means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title. 20 U.S.C. § 1401 (18).[12]

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[11] The 1990 amendments substituted "Individuals with Disabilities Education Act" for "Education of the Handicapped Act." See Pub.L.No. 101-476, § 901 (a) (1), 104 Stat. 1103, 1141-42 (1990), codified at 20 U.S.C.A. § 1400 (a) (West Supp. 1997). For ease of reference, the undersigned refers only to the IDEA, even when discussing cases interpreting the Act prior to the 1990 amendments.

[12] Texas fulfills its IDEA obligations through a statutory and regulatory scheme relating to the state's special education program. See Tex. Educ. Code Assn. §§ 29.001-29.014; 19 TAC §§ 89.1001-89.1190 (1997); see generally Frank Kemerer & Jim Walsh, The Educator's Guide to Texas School Law 77-100 (4th ed. 1996), The state requires that "the agency shall develop, and modify as necessary, a statewide design consistent with federal

In order to ensure a disabled child's right to free appropriate public education, the Act mandates that an Individualized Educational Program (IEP) be developed for each child. Formulation of the IEP is done by an Admission, Review and Dismissal ("ARD") committee made up of representatives from the local education agency or intermediate educational unit plus the child's parents, 20 U.S.C. § 1401 (a) (20). The IEP must include a statement (1) of the present levels of educational performance of the child, (2) of the annual goals, including short-term instructional objectives, (3) specific educational services to be provided, (4) projected date for initiation and anticipated duration of services, and (5) evaluation procedures. *Id.* The IEP must also include, to the extent possible, "mainstreaming" of the disabled student, i.e., instruction in a regular, not special, education setting. *See* 20 U.S.C. § 1412 (5).

The "free appropriate public education" tailored by an ARD Committee and described in an IEP, however, need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's

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law, for the delivery of services to children with disabilities in this state that includes rules for the administration and funding of the special education program so that a free appropriate public education is available to all of those children between the ages of three and 21." Tex. Educ. Code Ann. § 29.001. The state specifically permits school districts to enter into a contract to jointly operate special education programs (as occurred here), and provides that funds to which the cooperating districts are entitled may be jointly allocated in accordance to the districts' agreement. Id. at § 29.007.

unique needs, supported by services that will permit him "to benefit" from the instruction. *Cypress-Fairbanks I.S.D. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 690 (1998). Although the individual educational program must be "reasonably calculated to afford some educational benefit to the disabled child," the program need not provide services beyond a "basic floor of opportunity." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 198-201, 102 S.Ct. 3034, 102 S.Ct. 3034 [sic] (1982); *Cy-Fair I.S.D.*, 118 F.3d at 248. In those instances when a suitable or "appropriate" public educational placement is not available for a disabled child within a state or local school district, the district must implement an IEP that includes the costs of sending the child to an appropriate private institution. *Cy-Fair I.S.D.*, 118 F.3d at 248.

Procedures for appealing an IEP are set out in IDEA as follows:

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to –

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit –

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be

conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the state educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417 (c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413 (a) (12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

See 21 U.S.C. § 1415.

The standard of review used by courts reviewing cases under IDEA differs from the traditional summary judgment standard outlined in *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986) and *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Under IDEA, a reviewing court must apply a "modified de novo review" standard. *Board of*

Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S.C. 176, 206 (1982). This means that the court reviews the record "virtually" *de novo*, including the decisions of the state level and independent hearing officers, and the materials considered in the underlying state administrative proceedings. *Id.* at 206; *Cypress-Fairbanks I.S.D.*, 118 F.3d at 252. While according "due weight" to the hearing officer's findings, the court must ultimately reach an independent decision based on a preponderance of the evidence. *Cypress-Fairbanks I.S.D.*, 118 F.3d at 252. In the course of this proceeding, the court may consider evidence not before the hearing officer. *Id.*

A federal court's review of a special hearing officer's decision requires a two-part inquiry. First, the court must decide whether the state, through its local education agency or intermediate educational unit, complied with the procedures set forth in the IDEA. *Board of Education v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982). Second, the court must determine whether the IEP developed for the disabled child was "reasonably calculated to enable the child to receive educational benefits." *Id.; see also Buser v. Corpus Christi I.S.D.*, 51 F.3d 490, 492 (5th Cir.), *cert. denied*, 516 U.S. 916 (1995). Because there is no challenge to the procedures used in this case, the undersigned proceeds to the second prong of the test.

ANALYSIS

The placement of Sylvie at Élan requires this Court to consider the application of IDEA to a "voluntary" placement of a student in a restrictive private school. The undersigned's task is complicated by the fact that "the

IDEA and its implementing regulations are amorphous in design and imprecise in message" *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 103 F.3d 393, 397 (5th Cir. 1997) (calling IDEA a "vague and difficult statute."). In addition, certain portions of IDEA – concerning entitlement to educational benefits for students enrolled in private schools – were significantly amended in 1997, further complicating the analysis.[13] *See* Individuals with Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, 111 Stat. 37 (1997). These amendments state that they take effect upon enactment, which is June 4, 1997 and the amendments are prospective only. *Cypress Fairbanks I.S.D.*, 118 F.3d at 247 n. 1.[14]

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[13] In amending IDEA, Congress substantially limited the rights of disabled children enrolled by their parents in a private school." *See* 20 U.S.C. § 1412 (a) (10) (C) (i) (West Supp. 1998); *Peter v. Wedl*, 155 F.3d 992, 998 (8th Cir. 1998). However, these amendments do not apply when an IEP was improper (and a FAPE therefore not provided in the public school) and the private placement is the proper placement. "Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. "Individuals with Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, tit.1, § 612(a) (10) (A), (C), 111 Stat. 37, 62-63 (1997) (emphasis added).

[14] *See Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436 (10th Cir. 1997) (1997 amendments to IDEA are to be applied "only to events occurring after the amendments' effective date").

There is no question that under certain limited circumstances IDEA authorized full reimbursement for unilateral parental placements in private schools. *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996 (1985). *Burlington* held that the IDEA's grant of equitable authority under § 1415(e) (2) empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Id.*; *see also Doe v. Metropolitan Nashville Public Schs.*, 133 F.3d 384, 388 (6th Cir. 1998) (permitting reimbursement for unilateral placement upon a finding of sufficiently serious procedural failures by the school district).

Reviewing courts should first review the record to determine if the facts establish that the school district's individualized program provided the disabled student some educational benefit. If so, the inquiry ceases. If not, however, the court then turns to whether the placement was appropriate under the IDEA. Sylvie's parents may only recover the costs they incurred in unilaterally placing Sylvie at Élan if they establish that (1) the IEPs in effect at the time that Sylvie was removed from Dripping Springs I.S.D. were not reasonably calculated to provide Sylvie with a meaningful educational benefit, and (2) the parents' placement of Sylvie at Élan was appropriate under the IDEA.

A. Did Dripping Springs I.S.D.'s IEP Provide Educational Benefit?

There are four factors that can serve as indicators of whether an IEP is reasonably calculated to provide a meaningful, educational benefit under the IDEA. These are: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated. *Cy-Fair I.S.D.,* 118 F.3d at 253 (citing with approval the District Court record). These four factors are derived from and track the federal regulations which implement the IDEA. *Id.* at n. 29, *citing* 34 C.F.R. §§ 300.346(a) and 300.531-2 (assessment); 34 C.F.R. 300.500 (least restrictive environment); 34 C.F.R. §§ 300.343-345 (team approach); and 34 C.F.R. § 300.346(a) (5) (demonstrated outcomes). The Court addresses each of the *Cy-Fair* factors in turn.

A. Was the Dripping Springs I.S.D.'s Program Individualized?

IDEA requires that an IEP be individualized for each student. In the current case, the undersigned has carefully examined the administrative record and can find no evidence that Sylvie's program was not tailored to her needs. It is true that Sylvie was and is a bright child who, regardless, was failing some of her classes during her freshman year of high school. The primary reason for her failures was her refusal to complete homework. The issue for the undersigned is "why did Sylvie refuse to do homework and what, should the school have done about it?" The school could no more force Sylvie to do homework than could her mother. Sylvie appears to have been a rebellious child who, despite her intelligence, refused to adjust to the school's requirements. She was also clearly emotionally disturbed. However, she was receiving psychological help from many fronts. There is no evidence that Sylvie could not, in fact, do the work had she chosen to do so.

Sylvie's mother makes much of the "Suicide Contract" entered into after Sylvie made a suicidal gesture in November of 1995. After reviewing the entire record, the undersigned believes the school acted appropriately in assessing Sylvie's risk of suicide. The undersigned is confused as to counsel's repeated emphasis on the fact that Sylvie's mother was unaware of the contract. The mother was obviously aware of Sylvie's suicide threat. What possible difference could the existence of this relatively standard "contract" make in the mother's treatment of Sylvie? In other words, how would her knowledge of the contract have changed the mother's behavior? The contract was entered into in an excess of caution by a counselor who did not even really believe that Sylvie was a serious suicide threat but rather was using the threat of suicide to manipulate her mother. Indeed, no more suicidal gestures occurred after the contract. The undersigned does not find that the school erred in any way in getting Sylvie to promise to talk to someone before committing suicide. Because Sylvie's mother knew of the incident that caused the contract, there was no error or damage in failing to disclose it to her.

Although counsel for Plaintiff faults the school district for *not obtaining a psychological evaluation*, Sylvie was receiving a significant amount of psychological services during this time, which included school services as well as a private psychologist/psychiatrist and even, for a few months, had a child psychologist living in her home. The school was aware of these outside counselors. None of the outsiders to Dripping Springs I.S.D. ever recommended Sylvie be classified as seriously emotionally disturbed until after she was at Élan. Dr. Ceballos eventually certified Sylvie as having this disturbance, but Sylvie's behavior at school did not put the school on notice of her serious emotional issues. The undersigned has examined the school's efforts to reach and teach Sylvie, including the March, 1996 IEP modifications. These modifications could have, indeed probably would have, resolved the homework issue. The undersigned doubts, however, if anything other than time and/or distance could have resolved the parent/child conflicts which plagued Sylvie and her parents. There was abundant evidence that Sylvie's problems during her ninth grade year were not unique but were, in fact, common for this traumatic age. There is no evidence that Sylvie would not have progressed quite well at Dripping Springs High School if she had been in a placement other than with her mother. There is also no evidence that she would not have outgrown her problems over time and been able to return to her mother's home.

The undersigned sympathizes with Sylvie's parents in their travails over Sylvie and certainly does not fault them. It is clear they tried very hard to reach Sylvie and that the separation of Sylvie and her mother for a time may regrettably have been necessary. However, the undersigned does not see any *educational* needs Sylvie had that were not being met by Dripping Springs I.S.D.

B. Least Restrictive Environment.

Dripping Springs I.S.D. clearly had available multiple setting which would have been less restrictive than Élan. The residential treatment was for personal, not educational, needs. Dripping Springs I.S.D. clearly satisfies this element.

C. Were the Services Provided in a Coordinated and Collaborative Manner by the Key "Stakeholders"?

Sylvie and her mother actively participated in the ARD meetings. The undersigned can find no evidence that Sylvie's well-being was *not* of primary concern not only to her parents but also to the school. Despite the fact that Sylvie was failing some of her classes, she appeared relatively happy and well-adjusted while at school and she regularly attended school and counseling. The conflict was homework and Sylvie's unwillingness to do it. The modified IEP, formulated prior to Sylvie's running away, would have solved the homework issue. The school was consistently responsive to Sylvie's needs. While Sylvie should perhaps have been diagnosed earlier as emotionally disturbed, she was receiving counseling during the majority of this time, At the January ARD, Sylvie's mother discouraged further testing and indicated that Dr. Ceballos, Sylvie's private psychiatrist, was available to render an opinion. While it was doubtless terrifying for

Sylvie's parents when she ran away, there is no evidence that her running away was school related. School was not even in session the following week. When Sylvie was found, the preponderance of the evidence establishes that she did not say she didn't want to go back to school. Rather, she did not want to go back to her mother's house. The school's counselors and teachers were actively involved with Sylvie's mother in trying to help Sylvie and therefore satisfies this prong.

D. Were Positive Academic and Non-Academic Benefits Demonstrated?

Despite Sylvie's failing grades in some of her classes, her achievement tests stayed at grade level or higher except for math. All of Sylvie's teachers believed her to have been learning. The failing grades were attributable to not doing homework and, sometimes, as a result of failing quizzes because she didn't do her homework. While Sylvie's grades at Élan are noticeably higher, there was evidence that the academic standards were somewhat lower and class hours were certainly less.[15] Even if this is not true, there was no homework at Élan. If there had been no true "homework" at Dripping Springs I.S.D., Sylvie's grades would doubtless have risen dramatically. There was abundant evidence that ninth grade is a traumatic, transitional year for many students. Many students receive failing grades during their ninth grade year but few do by their senior year. Maturation is, in general, the reason for the improvement.

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[15] Four hours of school is far less than that required in Texas public high schools.

Sylvie's parents believed that Élan was best for their child. It is possible that Élan was, in actuality, the optimal setting for Sylvie. The results certainly indicate that it was a good setting for Sylvie. However, a school is not required to provide the best setting for its students. If that were true, every student would be taught in very small classes or one-on-one so that individual attention from teachers was readily available at all times. Fiscal constraints, however, require otherwise. All that a school is required to do is ensure that its students are receiving educational benefit. Sylvie was doing so. No more is required.

With respect to non-academic benefits, there was evidence that Sylvie made friends at Dripping Springs I.S.D. and in general had positive peer relationships. One fellow student appeared to have been verbally harassing her. Even though the school was told of this conduct, the school was unable to correct this misbehavior because Sylvie's mother could not supply the school with the offender's full name and Sylvie's mother refused to allow school officials to question Sylvie about the harassment. Other than this one incident, Sylvie appeared to also gain non-academic benefits from Dripping Springs I.S.D.

The above factors indicate that Sylvie's IEP was a FAPE. As such, the inquiry ends and judgment should be entered on behalf of the school district. In the alternative, the Court explores the placement at Élan.

2. Was Élan an Appropriate Placement?

One of the main concerns of Congress is that the state attempt, as best it can, to mainstream the child, that is, educate the disabled child among non-disabled children. *Flour Bluff I.S.D. v. Katherine M.*, 91 F.3d 689, 691 (5th Cir. 1996), *cert. denied,* 519 U.S. 111 (1997). Under the IDEA, a private placement at public expense is appropriate only if a school district is unable to provide the necessary services to the disabled student in a public school. *See* § 1413(a) (4) (B).

> Under the regulations governing the placement of a student in the "Least Restrictive Environment," a child should attend his or her neighborhood school unless the child's IEP requires arrangements that do not exist at that school. In fact, if the child requires such arrangements, the school district has numerous options (public or private) on placing the student. The regulations, not the statute, provide only that the child be educated "as close as possible to the child's home."

Flour Bluff I.S.D., 91 F.3d at 693-94.

The hearing officer found that Élan was not the least restrictive environment for Sylvie. The undersigned agrees. The fact that Sylvie did well at Élan does not satisfy the mandate of IDEA with respect to least restrictive environment. There were numerous less restrictive alternatives than Élan at Dripping Springs I.S.D. that Sylvie's parents refused to try. All of these intermediate, less restrictive alternatives were skipped over in Sylvie's move from Dripping Springs High school to Élan. As such, Plaintiff fails this prong.

CONCLUSION

The Court determines that Judgment should be entered in favor of Defendant. As such, this Court will enter a contemporaneous judgment this date dismissing the case in full.

SIGNED this 5th day of May, 1999.

/s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE JUDGE
PRESIDING UNDER
28 U.S.C. § 636(c)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SYLVIE M. b/n/f DIANE R.	§	
Plaintiff,	§	
	§	A-97-CA-314 SHC
v.	§	
BOARD OF EDUCATION OF DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT, TONY WIEHL, DEBRA MILLER, PAUL WATKINS, GLENN HECKERMANN, PAM PETERSON, PAT SIEDERS, MIKE FIGER, LENNY JASINSKI, VICKIE FULLER, JAMES ROSEBROCK, CHARLOTTE EVANS, TONI CARTER, HAYS-BLANCO SPECIAL EDUCATION COOPERATIVE, and SHARON EAST	§ § § § § § § § § § § § § § § §	
Defendants.	§	

FINAL JUDGMENT

The Court this date entered a Memorandum Opinion in the above-referenced cause. In the Memorandum Opinion, the Court determined that judgment would be granted in favor of Defendant. All pending motions are denied as moot and any relief not expressly granted in this judgment or in the Memorandum Opinion is **DENIED**. All parties will bear their own costs.

SIGNED this 5th day of May, 1999.

/s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE JUDGE
PRESIDING UNDER
28 U.S.C. § 636(c)

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, DATED AND FILED SEPTEMBER 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SYLVIE M. b/n/f DIANE R. §
Plaintiff, §
§ A-97-CA-314 SHC
v. §
BOARD OF EDUCATION OF §
DRIPPING SPRINGS §
INDEPENDENT SCHOOL §
DISTRICT, TONY WIEHL, §
DEBRA MILLER, PAUL §
WATKINS, GLENN §
HECKERMANN, PAM §
PETERSON, PAT SIEDERS, §
MIKE FIGER, LENNY JASINSKI, §
VICKIE FULLER, JAMES §
ROSEBROCK, CHARLOTTE §
EVANS, TONI CARTER, §
HAYS-BLANCO SPECIAL §
EDUCATION COOPERATIVE, §
and SHARON EAST §
§
Defendants. §

ORDER

Before the undersigned are Defendants' Motion to Limit the Scope of Trial and Supporting Brief filed April 13, 1998 (Doc. #25); Plaintiff's Response filed April 24, 1998 (Doc. #28); and Defendants' Reply filed July 24, 1998 (Doc. #41).

After review, the undersigned **GRANTS IN PART AND DENIES IN PART** the motion as follows: The Court does not desire to "retry" the administrative hearing. However, it would be helpful to have limited additional briefing and evidence to assist in the undersigned's decision. Specifically, the Court hereby permits each side to introduce no more than fifty (50) total additional pages of evidence and briefing. The Court encourages the parties to provide argument with citation to the administrative hearing record and citation to exhibits to facilitate the Court's review of the record. The parties may also provide – within the fifty page limitation – concise affidavits setting out summaries of relevant facts that have occurred subsequent to the administrative hearing.

These briefs/citations to the record are due from both parties *on or before October 23, 1998,* with no more than a five (5) page reply due by *October 30, 1998.*

SIGNED this 14th day of September, 1998.

/s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE JUDGE
PRESIDING UNDER
28 U.S.C. § 636(c)

APPENDIX D – ADDITIONAL AND AMENDED FINDINGS OF FACT OF A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS, DATED JANUARY 30, 1997

No. 378-SE-796

SYLVIE M., bnf	§	**BEFORE A SPECIAL**
DIANE R.	§	**EDUCATION**
	§	
Petitioner	§	**HEARING OFFICER**
vs.	§	
DRIPPING SPRINGS	§	**FOR THE STATE**
INDEPENDENT	§	**OF TEXAS**
SCHOOL DISTRICT	§	
	§	
Respondent	§	

Additional and Amended Findings of Fact

On January 10, 1997, the Hearing Officer issued a decision in this case. On January 21, 1997, both Petitioner and Respondent requested additional findings of fact. Due to January 20 being a legal holiday, these requests were timely.

After considering these requests, the Hearing Officer hereby supplements the final decision with additional and amended findings of fact, which are numbered for insertion in the final decision.

A. Amended Finding Related to Dripping Springs ISD

A-16. On August 15, 1995, Ms. Carter initiated a referral for a counseling assessment. Sandy Gravenor, a special education counselor working with Dripping

Springs High School, conducted the initial assessment by reviewing Sylvie's special education folder and interviewing Sylvie and one of her teachers. Ms. Gravenor recommended both individual and group counseling, to total two hours per month, to improve Sylvie's self-concept, increase her self-awareness and problem-solving skills, and help her identify and assert interpersonal rights. (Tr. at Vol. 4, pp. 1047-1054; Exh. R8-R11).

B. Additional Findings Related to Dripping Springs ISD

A-38. Neither the April 30, 1996 ARD nor the May 13, 1996 ARD included a teacher or staff member from the Élan School.

A-39. Sylvie's father and Ms. Fuller began discussing boarding schools in February 1996. Sylvie's father did not request a referral to a residential treatment facility (as that term is used in Texas), which would provide Sylvie a mental health program.

A-40. Sylvie's April 30, 1996 ARD recommended an occupational therapy assessment, but by the date of the hearing Dripping Springs ISD had not performed this assessment.

A-41. Until December 1995, when Sylvie was taken off her medications, she cooperatively took her medications at school.

A-42. During the 1995-96 school year. Vicki Fuller's responsibilities included crisis intervention and coordinating the Campus Action Program (CAP). Sylvie's campus had another full-time counselor, who was responsible for traditional academic counseling.

A-43. The CAP committee consisted of the school principal, the assistant principal, a counselor, and the special education coordinator. On November 30, 1995, this committee met to discuss Sylvie's suicide attempt. The committee recommended individual counseling.

A-44. Besides eight years of experience as a school counselor, Ms. Fuller had worked for a psychiatric liaison to a state hospital and in a private counseling clinic under the supervision of a psychiatrist.

A-45. Sylvie viewed her relationship with her mother as difficult, negative, and hopeless.

A-46. On several occasions, Sylvie expressed a desire to be placed in a foster home. She expressed this desire to Ms. Gravenor, Ms. Fuller, and the Shoal Creek Hospital staff.

A-47. Sylvie's school attendance was good, and she was not considered a discipline problem.

A-48. On March 5, 1996, Sylvie's father and Ms. Fuller discussed Élan as a possible boarding school for Sylvie. Sylvie's father told Ms. Fuller that Élan would be sending her a brochure about the school and its program. Élan mailed this brochure to Ms. Fuller on March 6, 1996.

C. Amended Finding Related to the Plan School

B-1. Élan is a private school with boarding facilities located in Poland, Maine. The school is licensed by the State of Maine as a "Special Purpose Day School." This license allows Élan to operate as a school for students with behavioral problems and to provide boarding facilities. This license also allows Élan to serve students with learning disabilities. The current enrollment is 130-145 students.

D. Additional Findings Related to the Élan School

B-15. Before Élan admitted Sylvie, its clinical director conferred with Sylvie's psychiatrist, Dr. Nelson Ceballos. Dr. Ceballos' notes reflect that he informed Élan's clinical director that Sylvie was no longer taking medications.

B-16. On April 25, 1996, Dr. Ceballos wrote a letter stating that he had conferred with Élan's clinical director and was recommending Sylvie's admission to Élan.

B-17. Élan has an accredited high school curriculum.

B-18. For the April 23-June 11, 1996 period, Sylvie earned Élan's "Student of the Week" award, which is based on effort, participation, attitude, and performance.

E. Additional Findings Related to the Psychological Evaluations

C-7. Since 1993, Greg Yahr has evaluated students at Élan. He is familiar with Élan's program and recommends it only if, in his professional judgment, the program is appropriate for the particular student.

C-8. Mr. Yahr concluded that Élan was meeting Sylvie's needs.

C-9. Mr. Yahr attributes the disparity between the parents' and school district's perceptions of Sylvie to the fact that in the school setting Sylvie's emotional needs were partially met.

C-10. In preparing his assessment of Sylvie, Dr. Keene never interviewed any of her teachers at Élan or asked them to complete a behavioral checklist or other assessment instrument. Dr. Keene never conferred with Dr. Ceballos about the appropriateness of the Élan placement.

C-11. In his assessment, Dr. Keene did not state that Élan had recently received commendable reviews by the Maine Department of Education.

SIGNED this 30th day of January, 1997.

/s/ Olivia B. Ruiz
Olivia B. Ruiz
Special Education Hearing Officer

APPENDIX E – DECISION OF THE HEARING OFFICER OF A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS, DATED JANUARY 10, 1997

No. 378-SE-796

SYLVIE M., bnf	§	**BEFORE A SPECIAL**
DIANE R.	§	**EDUCATION**
	§	
Petitioner	§	**HEARING OFFICER**
vs.	§	
DRIPPING SPRINGS	§	**FOR THE STATE**
INDEPENDENT	§	**OF TEXAS**
SCHOOL DISTRICT	§	
	§	
Respondent	§	

Decision of the Hearing Officer

STATEMENT OF THE CASE

Petitioner Sylvie M. contends that Dripping Springs Independent School District (ISD) denied her a free appropriate public education. She seeks reimbursement and prospective relief for her unilateral placement at a private school. She contends that her private-school program is appropriate, but her public-school program was not.

Respondent presents three principal arguments. First, the public school provided Sylvie an appropriate program. Second, even if her public-school program was inappropriate, the private-school program was also inappropriate. Third, the private-school program violated the requirement of least restrictive environment.

PROCEDURAL HISTORY

Petitioner filed a request for a due process hearing on July 22, 1996. On July 24, the Hearing Officer conducted a scheduling conference with Petitioner's counsel, Margie Best of Chicago, Illinois, and Respondent's counsel, Elena Gallegos, with the Austin firm of Walsh, Anderson, Underwood, Schulze & Aldridge. The Parties anticipated extensive discovery and agreed to waive their right to a final decision within 45 days of the hearing request. The hearing was scheduled for October 21-24.

On October 10, Petitioner's attorney filed a motion to continue the October 21-24 hearing because Petitioner's mother had back surgery. Respondent opposed the continuance. The Hearing Officer granted the continuance and rescheduled the hearing for November 12-15.

The hearing was held November 12-16. At its conclusion, the Hearing Officer set deadlines of December 30 for any post-hearing briefs and January 3 for any replies. The Hearing Officer agreed to render a final decision no later than January 10, 1997.

Findings of Fact

A. Findings Related to Dripping Springs ISD

A-1. Sylvie M. started having trouble with school work in fifth grade. She was identified as learning disabled in sixth grade and began receiving special education services. Later she was also classified as seriously emotionally disturbed. (Exhibit [Exh.] P9-282 – P9-295, R45, R46).

A-2. Sylvie's sixth-grade Comprehensive Individual Assessment noted several problem areas, which continued into high school. She has a short attention span and becomes discouraged easily. She has difficulty completing her school work, accepting responsibility for her actions, and establishing friendships with other students. She has poor writing skills, resists writing assignments, and often fails to complete classwork and homework. (Transcript (Tr.) at Vol. 3, pp. 827-831; Exh. P9-279 - P9-295).

A-3. Sylvie's sixth-grade Admission, Review, and Dismissal Committee (ARD) approved one hour per week of content mastery class and modifications to her school work. The ARD also recommended a medical evaluation, noting that Sylvie exhibited signs of Attention Deficit Disorder (ADD). (Tr. at Vol. 3, pp. 827-831; Exh. P9-279 - P9-295).

A-4. Sylvie was diagnosed as having ADD. She began taking ritalin. (Tr. at Vol. 2, pp. 490-91).

A-5. Sylvie often lied to her mother about her school work and whether she had completed it, which caused many conflicts between them. Sylvie's mother felt compelled to help Sylvie complete unfinished classwork, homework, and major projects. (Tr. at Vol. 3, pp. 829-835).

A-6. Sylvie's father lives in Paris, France, and she spent most summers with him. During the summer between seventh and eighth grade, Sylvie's parents decided that she would attend a private school in Paris for eighth grade (1994-95 school year). Sylvie's parents made this decision because of Sylvie's problems in school and the conflicts caused by her lying. (Tr. at Vol. 2, pp. 489-494; Exh. R59).

A-7. The change to Paris did not cause a corresponding change in Sylvie's behavior. For the first two months, Sylvie seemed to do well in her Paris school. By the middle of the fall term, however, Sylvie's father discovered that she had been lying about her assignments and disrupting class by talking to other students. Whether Sylvie lived with her father or her mother, her problems were essentially the same: lying about school assignments, failing to complete homework, being disorganized, and failing to perform assigned household chores. (Tr. at Vol. 2, pp. 493-496; Vol. 3, pp. 480-841; Exh. R59).

A-8. In March 1995, Sylvie called her best friend and told her she had swallowed a bottle of aspirin. The friend called Sylvie's father. Sylvie was rushed to the hospital, and her stomach was pumped. Shortly before this incident, Sylvie's father imposed restrictions upon her because of her poor performance in school. This incident was the first in a series, all of which occurred close in time to report cards or interim progress reports from school. (Tr. at Vol. 2, pp. 493-494; Vol. 3, pp. 842-844; Exh. R59).

A-9. Shortly after this incident, on March 22, 1995, Sylvie returned to Dripping Spring ISD. Sylvie's mother told the school counselor, Bridget Cave, about Sylvie's suicide attempt. Sylvie's transfer ARD discussed her suicide attempt and her difficulty completing school assignments in Paris. The ARD approved content mastery class for one hour per week. Dripping Spring ISD did not evaluate Sylvie to determine if she needed additional services or had other disabilities. (Tr. at Vol. 2, pp. 461-464; Vol. 3, pp. 484-485; Exh. P9-321 – P9-326, R2).

A-10. Before Sylvie went to Paris, her mother had become involved with a man named Ron R. He and Sylvie seemed to have a good relationship. While Sylvie was in Paris, her mother and Ron got married. When Sylvie returned from Paris, Ron began helping her with school work. Like Sylvie's mother and father, Ron soon discovered that Sylvie was lying about her homework assignments. When Ron tried to get Sylvie to do her homework, she resisted. (Tr. at Vol. 3, pp. 846-850).

A-11. Sylvie did not want Ron to be part of her family. She told her mother that she hated Ron and that she would kill herself unless her mother left him. Sylvie's mother immediately had her admitted to Shoal Creek Hospital, and she remained there until after the school year ended. While school was still in session, Sylvie's mother informed Ms. Cave that Sylvie had threatened to commit suicide. (Tr. at Vol. 2, pp. 461-473; Vol. 3, pp. 857-62, 864; Exh. R50, R59).

A-12. The Shoal Creek Hospital discharge summary reflects that Sylvie was admitted because of severe depression, suicidal ideation, and a suicide threat. During Sylvie's two-week stay, the hospital diagnosed major depression (single episode), dysthymia, parent-child conflict, and attention deficit hyperactivity disorder (ADHD). She received anti-depressant medication. (Exh. P6, P7, P8, R50).

A-13. While in the hospital, Sylvie focused on her relationship with her mother and stepfather. At first, she threatened to run away or kill herself if she was forced to return home. By the time of discharge, however, she was no longer threatening to run away or kill herself. During hospitalization, Sylvie reported a decreased appetite and insomnia. She exhibited fatigue, low self-esteem, and withdrawal. Upon discharge, she entered the hospital's adolescent day program. She continued taking ritalin and anti-depressants. (Exh. P6, P7, P8, R50).

A-14. During the summer of 1995, Ms. Cave contacted Sylvie's private psychologist to discuss Sylvie's situation. Dr. Evans, the ninth-grade counselor at Dripping Springs High School, also conferred with the psychologist. (Exh. P8, R52).

A-15. Before Sylvie entered ninth grade, her mother informed Toni Carter, the diagnostician used by Dripping ISD, and Beth Rawlings, the high school's content mastery teacher, about Sylvie's problems and her hospitalization. Neither Ms. Carter nor Ms. Rawlings suggested an evaluation to determine whether Sylvie was emotionally disturbed. (Tr. at Vol. 3, pp. 738-743, 865-867).

A-16. At her mother's request, Sylvie was referred for a counseling assessment. Sandy Gravenor, a special education counselor working with Dripping Springs High School, conducted the initial assessment by interviewing Sylvie and a teacher, and by reviewing Sylvie's special education folder. Ms. Gravenor recommended both individual and group counseling, to total two hours per month, to improve Sylvie's self-concept, increase her self-awareness and problem-solving skills, and help her identify and assert interpersonal rights. (Tr. at Vol. 4, pp. 1047-1054; Exh. R8-R11).

A-17. Shortly after the assessment, Sylvie began receiving group counseling. Sylvie's group, which consisted of six girls and Ms. Gravenor, usually met 30 minutes per week. Sylvie actively participated in the group. Dripping Springs ISD did not provide individual counseling until November 28, after the Thanksgiving holidays. (Tr. at Vol. 4, pp. 1157-1162; Exh. R42).

A-18. For the first six weeks, Sylvie passed her classes. For the second six weeks, ending on November 3, Sylvie failed three courses – World Geography, Health, and English. Sylvie told neither her therapy group nor Ms. Gravenor that she was failing three courses. (Tr. at Vol. 4, pp. 1110, 1167; Exh. R14, R17, R36).

A-19. During the Thanksgiving holidays, Sylvie's mother received a report concerning Sylvie's work during the first half of the third six weeks. This report, which showed that Sylvie was still failing to complete classwork, homework, and projects, led to an argument between Sylvia [sic] and her mother. Later that evening, Sylvie told her mother that she had taken an overdose of aspirin. Her mother again rushed her to Shoal Creek Hospital. (Tr. at Vol. 3, pp. 868-875; Vol. 4, p. 1167, Exh. R39-R41, R50).

A-20. On November 27, the first day after the Thanksgiving holidays, Sylvie's mother informed school personnel of the latest incident. Beth Rawlings, the content mastery teacher, referred Sylvie's case to the Campus Action Program (CAP), a committee of school employees to help students in crisis. The CAP referral form lists the following behaviors as the reason for the referral: secrecy about self; dramatic attention seeking; declining grades; declining achievement; defensive/denial/blaming; and suicide attempt. (Tr. at Vol. 2, pp. 392-395; Exh. R15, R16, R39-R42).

A-21. On November 28, Dripping Springs ISD provided Sylvie her first individual counseling session. Her counselor was the Special Education Counselor working with Dripping Springs ISD. (Tr. at Vol. 4, p. 1154; Exh. P9, R15, R41, R42).

A-22. Vicki Fuller, the ninth-grade counselor substituting for Dr. Evans, also met with Sylvie on November 28. Ms. Fuller informed her that she had talked with her mother and knew about the Thanksgiving-holiday incident. Sylvie told Ms. Fuller that she had threatened suicide because she feared her mother's reaction to her poor school performance. Ms. Fuller had Sylvie sign a "Stay Alive Contract" in which Sylvie agreed not to kill herself without first talking to a school counselor or the suicide-prevention hotline. (Tr. at Vol. I, pp. 134-36; Vol. 3, pp. 872-73; Exh. R16, R41).

A-23. On November 30, the CAP committee met to discuss Sylvie's situation. The committee recommended that Sylvie receive in-school counseling from the ninth-grade counselor and be closely monitored for academic or behavioral changes. In addition, the committee recommended that a school-home communication system be established. (Tr. at Vol. 395; Exh. R15, R41, R42).

A-24. On December 6, Sylvie's mother requested a weekly report from each of Sylvie's teachers concerning classwork and homework. The school provided these reports sporadically, not weekly. (Tr. at Vol. 3, pp. 869-872; Exh. P9-2, P9-8, R15, R41).

A-25. On December 8, Dripping Springs ISD conducted Sylvie's three-year evaluation. Toni Carter, the diagnostician working with Dripping Springs ISD, administered the Kaufman Brief Intelligence Test and the Wechsler Individual Achievement Test. Ms. Carter knew about Sylvie's failing grades, depression, suicide threats, suicide attempts, and hospitalization. She even noted that "Sylvie's affective disorder is no doubt having a negative impact on her school success." Nevertheless, Ms. Carter performed no psychological testing. Nor did she refer Sylvie for a psychological evaluation. (Tr. at Vol. 3, pp. 712-719, 739-743; Exh. R18).

A-26. At the end of the fall semester, Sylvie failed World Geography and Health. (Exh. R36).

A-27. Sylvie's annual ARD met on January 16, 1996 to discuss Sylvie's three-year evaluation and her failing grades. The ARD learned that Sylvie was refusing to take her prescribed medication. The ARD noted that Sylvie was having trouble in her courses because she was not turning in her work, and that she was disrupting class by talking to other students. The ARD agreed to contact Sylvie's psychiatrist to explore whether Sylvie should be classified as "emotionally disturbed." The ARD developed a new Individualized Education Plan (IEP), which identified new counseling goals and added modifications and an Inclusion English class. The ARD tentatively scheduled another meeting for February 15 to review the report from Sylvie's psychiatrist. The February meeting did not occur, so the January 16 ARD was Sylvie's last ARD before her unilateral placement in a private school. (Tr. at Vol. 3, pp. 763-64; Exh. R18-R21).

A-28. On January 29, 1996, halfway through the fourth six weeks, Sylvie's mother received a report that Sylvie was failing three classes. Sylvie was still failing to complete classwork and homework. The number of assignments she had not turned in accumulated rapidly. The conflict between Sylvie and her mother increased. (Tr. at Vol. 3, pp. 885-886; Exh. P9-14 – P9-27, P9-68 – P9-89, R23).

A-29. On the night of February 14, Sylvie ran away from home for the first time. She was gone for three or four hours. The next day, Sylvie's mother asked Ms. Fuller for help in finding private counseling services. Ms. Fuller later contacted the Scheib Center in San Marcos, Texas, and scheduled an appointment for March 12. (Tr. at Vol. 1, p. 239; Vol. 3, pp. 893-895; Exh. R27, R41).

A-30. On February 16, Sylvie's father called Ms. Fuller to discuss Sylvie's situation and to explore the possibility of a boarding school to provide Sylvie and her mother a respite. Sylvie's father and Ms. Fuller discussed several boarding schools, but no decisions were made. (Tr. at Vol. 2, pp. 500-506; Exh. 41).

A-31. On February 20, Toni Carter received from Dr. Nelson Ceballos, Sylvie's psychiatrist, an "Eligibility Report – Emotionally Disturbed." In this report, Dr. Ceballos noted that Sylvie experienced a general pervasive mood of unhappiness or depression for the last 18 months. He described her emotional disturbance as a combination of bipolar disorder, depression, and ADHD. According to Dr. Ceballos, the functional implications for situations involving instruction are depression, mood swings, and suicidal thoughts. (Tr. at Vol. 3, pp. 768-771; Exh. R26).

A-32. On February 27, Sylvie's mother informed Ms. Fuller that Sylvie had threatened suicide the night before in response to being required to do homework. Ms. Fuller did not call an ARD to address this incident. Nor did she recommend a psychological evaluation to determine whether Sylvie's suicide threats posed a serious risk or whether Sylvie should be classified as "emotionally disturbed." (Tr. at Vol. 1, p. 190; Exh. R41).

A-33. On March 1, 1996, Ms. Fuller and Sylvie's teachers met to discuss Sylvie's mother's request that Sylvie be required to complete all school work while still at school to avoid conflict concerning homework. The school personnel recommended that Sylvie's mother receive weekly reports, that Sylvie receive peer tutoring during class and after-school tutorials twice a week, and that Sylvie be allowed to complete Theater Arts assignments during content mastery class. (Tr. at Vol. 1, pp. 244-250, 247-252; Exh. P9-27 - P9-28, R28, R29, R30).

A-34. On March 4, Ms. Fuller met with Sylvie to explain the new program that Ms. Fuller and the teachers had developed. On March 6, Sylvie ran away. (Tr. at Vol. 1, pp. 260-261; Exh. R42).

A-35. On March 10, 1996, Sylvie was found on "The Drag" near the University of Texas at Austin. Her father, who had flown from Paris, found her in a shocking condition. Her head was shaved, and she wore a dog collar around her neck. She wore black lipstick, heavy black makeup, and bizarre, tattered clothing that was not hers. She was with other teenagers who lived on the streets. When Sylvie's father first approached her, he called her by name. She repeatedly insisted that her name was Karma, not Sylvie. Sylvie's father was shaken by this experience. He strongly believed that Sylvie needed a more structured environment 24 hours a day. Four days later, on March 14, he and Sylvie traveled to Poland, Maine to enroll her in the Élan School, a private boarding school. On March 18, Dripping Springs ISD sent Sylvie's mother a report showing that Sylvie was failing three courses. (Tr. at Vol. 2, pp. 506-512; Exh. R32, R41, R59).

A-36. Sylvie's parents requested that Dripping Springs ISD pay Sylvie's Élan School tuition. On April 30, 1996, ARD met to consider this request and other matters. After reviewing Dr. Ceballos' February 20 report, the ARD concluded that Sylvie qualified for special education services under the "emotionally disturbed" classification. The ARD further concluded that this emotional disturbance, rather than Sylvie's learning disability, was the primary disability. The ARD noted that her bipolar disorder and ADHD were significant health factors that affect her in an instructional setting.

The ARD did not agree to pay the Élan School tuition. It did not increase Sylvie's counseling beyond the previously approved two hours per month. It recommended a psychological evaluation but never asked Sylvie's mother to sign a consent form, even though parental consent is required. Due to Sylvie's poor handwriting, it recommended an orthopedic evaluation. It also developed a behavior management plan designed to have Sylvie attempt assigned work and seek assistance in a crisis.

Sylvie's IEP for the remainder of the 1995-96 school year consisted of Inclusion English, one hour per week of content mastery class, a study skills class, tutorials, a behavior management plan, and two hours of counseling per month. The ARD approved the same IEP for 1996-97 school year, except that it eliminated Inclusion English and the study skills class. (Tr. at Vol. 1, pp. 168-169; Vol. 3, pp. 723-730, 772, 912; Exh. R45).

A-37. Dripping Springs ISD and Sylvie's family had remarkably different perceptions of her. For example, Sylvie's mother perceived a clinically depressed child who threatened and attempted suicide, refused to take prescribed medication, habitually lied, had trouble making friends, engaged in screaming arguments at home, and regularly failed to complete school work. In sharp contrast, Dripping Springs ISD personnel perceived an intelligent child who did not misbehave; she merely chose not to complete school work. (Tr. at Vol. 1, pp. 134-135; Vol. 3, pp. 885-886; Exh. R19, R20, R23).

B. Findings Related to the Élan School

To avoid repetition, the record cites for all Section B findings of fact are being provided only once: Transcript, Volume 2, pp. 645-650, Volume 5, pp. 1312-1370; Exhibits P5, R31, R54, R57, R59, R70.

B-1. Élan is a private school with boarding facilities located in Poland, Maine. The school is licensed by the State of Maine as a "Special Purpose Day School." This license allows Élan to operate as a school for students with behavioral problems and to provide boarding facilities. The current enrollment is 130-145 students.

B-2. Élan's students live in one of three self-contained buildings, 40-60 students in each building, and have little contact with students in the other two buildings. They eat, sleep, attend classes, participate in group therapy, and share work responsibilities with residents of their own building. Approximately two Élan staff members are assigned to each building.

B-3. Élan's program consists of a behavioral-level system that is highly structured. At each level, students perform specific tasks. High-level students supervise low-level students and hold them accountable for failure to complete assigned tasks, such as making beds, mopping floors, or delivering food. The goal of this program is to teach task completion, responsibility for self and others, and respect for authority. Students are expected to be part of a community and to operate within its clearly defined structure. The underlying theory is that students who learn these skills and behaviors within the Élan environment can transfer them to home and school environments. In essence, students who learn responsibility in some areas will become responsible in other areas.

B-4. The Élan program is specifically designed for students who engage in severely disruptive conduct or have substance abuse problems. Élan uses a peer-confrontation model in which peer confrontation is the primary means of dealing with deviations from expected behavior. In practice, the confrontations are extremely aggressive. Students are encouraged to scream, curse, and use vulgar epithets when confronting a peer who falls short of expectations. The student being confronted is never permitted to respond.

B-5. Four times a day, students clean the building in which they live. Cleaning typically takes 20-45 minutes. Much of the Élan program revolves around a student's performance during these cleaning periods. Élan believes that cleaning assignments teach students to follow instructions, be accountable for their responsibilities, and make correct decisions even if peers are uncooperative. Élan requires supervising students to confront immediately any student not on task or cleaning improperly. These confrontations usually occur outside the presence of Élan staff. Students who fail to confront are confronted for such failure, which impedes their advancement through the level system.

B-6. Each of the three buildings holds a daily meeting from 10:00-11:00 a.m. During this meeting, students are expected to confess their shortcomings in complying with the Élan program and present a plan of action. If they later have a problem implementing the plan, they are expected to confess their problem to the group. This meeting is primarily confessional, not confrontational.

B-7. Each building also has a general meeting scheduled daily 11:00 a.m. The sole purpose of a general meeting is to confront, on a massive scale, any student unwilling to conform to the Élan program. If there is no need for a general meeting, an informational or current events program is substituted. During September 1996, Sylvie's building held a general meeting two or three times a week.

B-8. When general meetings occur, they involve intense confrontation. An Élan director attends, and the confrontation begins with the targeted student standing in front of the group. A broomstick is laid on the ground about five feet from the student, and confronters may not cross it. Confronters may say whatever they want during a confrontation. Typically, the targeted student is characterized as worthlessness [sic] and disgusting and is subjected to cursing, epithets, and vulgarities, all delivered in screaming voices. The Élan director is the first to confront the student, followed by the senior staff. Then students come forward, sometimes in groups, to confront the targeted student. Confrontations last as long as 30 minutes. The targeted student is never allowed to respond.

B-9. Confrontations also occur when a student is "written up in the book." Each building keeps a log in which students are encouraged to record the transgressions of other students. Any student "written up in the book" is summoned before high-level students and a staff member. After the transgression is read to the targeted student, the confronters castigate the student in the same manner as in general meetings. During the confrontation, the student must stand in silence. When the confronters are finished, the student must say "thank you" and leave.

B-10. Group meetings are held on weekdays from 2:00-4:00 p.m., and a staff member is present. Two meetings per week are for expressing anger to other group members, two meetings provide a forum to discuss emotional issues, and one meeting is devoted to sports. Each building holds a 30-minute meeting at 4:00 p.m. to discuss concerns and reflections.

B-11. Élan students attend school five evenings per week from 6:30-10:30 p.m. During the summer, they attend school only two hours each weekday evening. From Monday through Thursday, students attend academic classes. On Friday, students work on classroom assignments but receive no instruction. The students are never assigned homework because Élan's behavioral program consumes most of their waking hours.

B-12. Élan's academic program is staffed by certified teachers, most of whom are certified in special education. Classes usually have 8-10 students. The Director of Education is a certified guidance counselor who provides vocational and educational planning but not psychological counseling.

B-13. Élan has not classified Sylvie as emotionally disturbed or learning disabled. Sandra Munn, Élan's IEP Coordinator, explained that privately referred students are not admitted under a special education classification. Élan provides Sylvie neither related services nor special assistance. Sylvie is currently doing well in her academic courses, which she described as easier than her Dripping Springs courses.

B-14. When Sylvie enrolled in March 1996, Élan's brochure offered "individual and group counseling," "family counseling," and "group therapy." The brochure also referred to the "therapist" and the "therapeutic staff." In reality, Élan had not a single professional licensed to provide therapy, counseling, or clinical supervision of confrontations and group sessions. The absence of any licensed professional continued until October 1996, when one employee with a Masters in Social Work received a conditional license. The next month another employee became a licensed psychologist. Apart from these two employees, the non-academic staff of Élan consists entirely of unlicensed individuals trained by Élan to implement its program.

C. Findings Related to the Psychological Evaluations

In preparation for this due process hearing, Petitioner and Respondent each retained a psychologist to evaluate Sylvie in Maine. Petitioner retained Mr. Greg Yahr, a school psychologist in Falmouth, Maine, who evaluated Sylvie in August 1996. Respondent retained Dr. Doug Keene, a licensed psychologist in Austin, Texas, who evaluated Sylvie in September 1996. Both psychologists conducted a cognitive assessment, emotional assessment, and academic evaluation. Dr. Keene partially relied upon Mr. Yahr's testing but drew his own conclusions.

In their extensive written reports, both psychologists interpreted the test results, provided their impressions of Sylvie, and made both academic and non-academic recommendations. They also testified about these matters at the due process hearing. To a remarkable extent, the two psychologists were in agreement. Dr. Keene reviewed Mr. Yahr's evaluation and agreed with most of his analysis and recommendations. For purposes of this decision, it is unnecessary to detail each psychologist's findings, conclusions, and recommendations. It is sufficient to summarize the relevant points.

To avoid repetition, the record cites for all Section C findings of fact are being provided only once: Transcript, Volume 2, pp. 649-686; Volume 5, pp. 1370-1438; Exhibits P2, P4, R31, R54, R57, R59.

C-1. Both psychologists used at least some parts of the Wechsler Intelligence Scales for Children, 3rd Edition (WISC-III), and reached similar conclusions. Sylvie's full-scale IQ score is 122-125, placing her in the high-average to superior range in areas unaffected by her disabilities.

One WISC-III subtest indicates that Sylvie has good intellectual skills in areas normally corresponding to academic success, but she needs adequate time and a quiet setting in which to work.

C-2. Both psychologists used the Woodcock-Johnson Achievement Test – Revised and obtained similar standard scores on all five subtests. These scores were generally commensurate with Sylvie's high intellectual ability, except in mathematics, the area in which she has a learning disability. Sylvie has an excellent ability to express herself both verbally and in writing. Except in mathematics, both psychologists agreed that she is at or above grade level in all areas. In mathematics, one psychologist thought she was at grade level and the other thought she was below grade level.

C-3. Both psychologists agreed with the diagnosis of "dysthymia, early onset," which indicates that Sylvie has been depressed for a long time. Both agreed that Sylvie has been depressed since before high school.

C-4. Both psychologists agreed that Sylvie's primary need is counseling. She sorely needs individual, group, and family counseling. They disagree, however, about when this counseling should begin. Mr. Yahr believes that Sylvie is not yet ready for counseling, but she would be after she advances to a higher level in Élan's behavioral-level system. In contrast, Dr. Keene believes that Sylvie has a positive attitude about counseling and should begin immediately. This is the most significant disagreement between the psychologists.

C-5. The records concerning Sylvie's therapy from Shoal Creek Hospital, Drippings Springs ISD, and her private psychologist show that Sylvie had actively engaged in the counseling process. There was no intervening factor that suggests she is now unprepared to resume this process.

C-6. Though the psychologists disagree whether Sylvie is ready for counseling, they agree that Élan does not offer the counseling that Sylvie needs. The mismatch between Élan's program and Sylvie's needs means that her continued enrollment there would only postpone the counseling that Sylvie urgently needs.

DISCUSSION

The threshhold issue is whether Sylvie, considering her unilateral placement at the Élan School, is entitled to tuition reimbursement from Dripping Springs ISD. The next issue, reached only if reimbursement is warranted, is whether Dripping Springs ISD must pay her Élan tuition for the remainder of the 1996-97 school year.

The United States Supreme Court set the standard that parents must meet to be reimbursed for a unilateral private-school placement. To receive tuition reimbursement, parents must show that the school district's educational program is inappropriate and that the private school's program is appropriate. *School Comm. of Burlington v. Department of Ed. of Mass.,* 471 U.S. 359, 369 (1985); *Florence County Sch. Dist v. Carter,* 114 S.Ct. 365 (1993).

To receive reimbursement, Sylvie must discharge two burdens of proof. First, she must show that Dripping Springs ISD's programs for the 1995-96 and 1996-97 school years were inappropriate. *Tatro v. The State of Texas,* 703 F.2d 823, *aff'd in part and rev'd in part sub. nom., Irving Independent School District v. Tatro,* 468 U.S. 883 (1984). Second, she must show that the Élan School's program was appropriate. If Sylvie fails to discharge either burden, she is not entitled to reimbursement. *School Comm. of Burlington v. Department of Ed. of Mass.,* 471 U.S. 359, 105 S.Ct. 1996 (1985).

The Supreme Court also set the standard for determining whether an educational program is appropriate. The standard is whether the program is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982).

1. Dripping Springs ISD's Programs Were Inappropriate.

During the 1995-96 school year, Dripping Springs ISD possessed information strongly indicating that Sylvie might have an emotional disturbance. The school district knew that Sylvie had made, and was continuing to make, suicide threats and suicide attempts. The district also knew that Sylvie, a student of above-average intelligence, was consistently failing courses. Nevertheless, the district sought a psychological evaluation only after Sylvie initiated this due process proceeding.

When Sylvie had her three-year evaluation in December 1995, the school district conducted only intelligence and achievement tests, which confirmed Sylvie's learning disability in mathematics. Due to its failure to seek a psychological evaluation, the district based Sylvie's program on incomplete information. This resulted in a fatally flawed program.

When the district finally conducted a psychological evaluation to prepare for litigation, the report of its psychologist showed that the district's program had largely failed to address Sylvie's needs. This failure was corroborated by the report of Sylvie's psychologist. The two psychologists' reports show that the district's program was deficient in several areas.

The most significant deficiency was in the area of counseling. Sylvie attempted suicide in March 1995 and threatened suicide in May 1995. In August 1995, the district began providing Sylvie a group session with five other students, which usually met 30 minutes per week. These group sessions, which addressed problems common to many ninth graders (e.g., friends, school work, and home life), were insufficient to address Sylvie's serious emotional disturbance.

The district waited until Sylvie's mother reported another suicide attempt in November 1995 to begin providing individual counseling. Even then, the district provided only four individual counseling sessions from November 1995 to March 1996.

Both psychologists agreed that Sylvie had been depressed since before the 1995-96 school year. The school district knew that Sylvie had been placed in a psychiatric hospital in May 1995 after a suicide threat, which followed a suicide attempt two months earlier. Based on this information and Sylvie's deteriorating school work during the Fall 1995 semester, the school district should have provided individual counseling before November 1995. Furthermore, after Sylvie's next suicide attempt in November 1995, the district certainly should have provided individual counseling on a frequent basis.

Sylvie's IEPs for January 1996 and April 1996 each provide for individual and group counseling, but only for a combined total of two hours per month. In his report, the district's psychologist recommends that Sylvie receive, as a related service, one hour of individual counseling per week. In addition, he recommends that Sylvie receive group therapy. The counseling provided by the district fell far short of these recommendations and was grossly inadequate to meet Sylvie's needs.

The district's lack of a psychological evaluation during the 1995-96 school year led to other deficiencies in its programs. Notwithstanding Sylvie's serious emotional disturbance, her IEPs contain no meaningful plan for addressing her failure to complete classwork and homework. Nor do they adequately address her lack of organizational skills. With the possible exception of group therapy, the IEPs provide no assistance in developing friendships at school. There are no provisions for a school-parent communication system. All these needs were identified by the reports of the two psychologists.

The school district disputes that it failed to seek a psychological evaluation in a timely manner. The district argues that Sylvie's hospitalization in May 1995 and the events preceding it did not warrant a psychological evaluation because nothing indicated her school work was being affected. The Hearing Officer agrees with the district's position, but only up to this point, because thereafter its position becomes untenable.

After the Thanksgiving holidays, Sylvie's mother informed the school that Sylvie had attempted suicide after an argument over her bad grades. Sylvie told her school counselor that she had taken only four Tylenol and was not really trying to kill herself, but only wanted to distract her mother from the bad report card. The counselor accepted Sylvie's version and decided she was not really a suicide risk. However, the evidence at the due process hearing, including the testimony of the district's psychologist, suggests that the counselor erred in summarily dismissing the risk of suicide.

Even if Sylvie's intentions were exactly as she stated, her behavior raised a red flag. Regardless of the suicide risk, Sylvie's threats to kill herself and her actions mimicking suicide attempts strongly indicated an emotionally disturbed adolescent. When the district learned of the Thanksgiving suicide incident, it already knew that Sylvie was failing courses and was failing to complete classwork and homework. This was more than enough information to warrant a psychological evaluation.

When the district performed Sylvie's three-year evaluation in December 1995, the need for a psychological evaluation was obvious. In August 1995, Sylvie's mother had personally informed the diagnostician about Sylvie's suicide attempt, her admission to a psychiatric hospital, and her problems in school. This information, coupled with Sylvie's deteriorating academic performance, should have caused the diagnostician to suspect an emotional disturbance and seek a psychological evaluation.

Other developments further highlighted the need for a psychological evaluation. By February 1996, Sylvie was failing three courses and her teachers noticed her declining performance. The same month, Sylvie's mother informed the school counselor of two separate incidents. One was that Sylvie ran away for the first time. The other was that Sylvie threatened suicide when required to do homework. Also the same month, the district received an "Eligibility Report – Emotionally Disturbed" from Sylvie's psychiatrist, which established her disability but lacked the information needed to develop her IEP. Only a psychological evaluation would have provided the needed information, but the district still did not request one.

One of the district's employees testified, in effect, that she would refer a student for a psychological evaluation only if the student exhibited extreme behavior in the classroom. Since Sylvie's classroom behavior was not extreme, the employee saw no need to seek a psychological evaluation. To ignore Sylvie's out-of-class suicide threats and attempts because she was not a behavior problem in class brings to mind that "Nero fiddled while Rome burned."

The district is not responsible for Sylvie's serious emotional disturbance. However, it is responsible for identifying her disability and addressing its educational impact. The district's failure to seek a psychological evaluation has had tragic implications for Sylvie. Her lost educational opportunities cannot be replaced. This unfortunate situation occurred because the district failed to obtain the information it needed to address Sylvie's educational needs.

When the psychological evaluations were finally performed, they showed that Sylvie was at or above grade level in every area, with the possible exception of mathematics. The district contends that these test results prove Sylvie was receiving an educational benefit; therefore, the district's programs must have been appropriate. Both IEPs under consideration, January and April 1996, were developed after the fall semester in which Sylvie failed to turn in much of her work, failed two courses, and barely passed three courses. Considering Sylvie's intelligence and abilities, her pathetic grades indicate that she was not receiving an educational benefit.

During the due process hearing, the district seemed to blame Sylvie's mother for Sylvie's failure. The Hearing Officer has two problems with this approach. First, the evidence overwhelming [sic] shows that Sylvie's serious emotional disturbance – and the district's failure to address it – were the primary causes of her failure. Second, parents and school districts typically have ongoing relationships, so engaging in conduct that poisons the relationship seems ill-advised.

There is one other issue concerning the April 1996 IEP. The district contends that its IEP for the 1996-97 school year mistakenly included proposed services and classes, which should instead be determined by a transfer ARD when Sylvie returns. Accordingly, the district contends that it should not be held accountable for any deficiencies in these proposals. Unfortunately, the district failed to inform Sylvie's parents that her IEP did not really mean what it said. Any clerical error must be corrected long before a due process hearing, and the parents must be notified immediately. An IEP is a legally binding agreement to provide educational services. Parents must be able to rely on an IEP, as written, to assess the appropriateness of a district's program. The Hearing Officer cannot treat the IEP's proposed services and classes as a clerical oversight.

The Hearing Officer finds that Sylvie's January 1996 annual IEP was inappropriate. The Hearing Officer also finds that Sylvie's April 1996 IEP, which addressed the remainder of the 1995-96 school year and the 1996-97 school year, was inappropriate.

2. Élan School's Program Was Inappropriate

After carefully considering the evidence, the Hearing Officer concludes that Sylvie failed to show the appropriateness of the Élan School's program. The principal reason for this conclusion is that Élan fails to address either of Sylvie's disabilities.

Sylvie's primary disability, her severe emotional disturbance, warrants individual, group, and family counseling. Élan provides no individual or family counseling. Although Élan provides a form of group counseling, it had no licensed professional to conduct or supervise the groups. Sylvie needs intensive therapy with counselors trained to recognize and address her emotional issues. She is not receiving this at Élan.

Élan provides the same behavioral program to all students, regardless of their individual needs. Whether a student has a medical, psychological, or substance abuse problem, Élan treats everyone as a behavioral problem. Many Élan students have a substance abuse problem or a behavioral disorder. Based on the evidence, Sylvie has neither. Though Élan's program may be appropriate for other students, it is way off target for Sylvie.

The Élan program involves intense, aggressive confrontation. The evidence shows that Sylvie needs acceptance, love, and affection. These seem to be in short supply at Élan, where screaming is encouraged but touching is forbidden. After five days of testimony and many more days reviewing the documentary evidence and the transcript, the Hearing Officer believes that Élan may actually be harmful to Sylvie.

Élan also fails to address Sylvie's secondary disability, her learning disability in mathematics. She receives no special education services in or out of the classroom. Sylvie is a bright young woman whose education is affected by two disabilities. She needs an educational program that addresses her disabilities. Élan is not providing such a program.

3. Conclusion

In conclusion, the Hearing Officer finds that Dripping Springs ISD failed to provide Sylvie an appropriate educational program. However, Sylvie failed to show that her unilateral private-school placement provided her an appropriate program.

Conclusions of Law

1. Sylvie is eligible for special education services from Dripping Springs ISD under the classifications of emotionally disturbed and learning disabled. 20 U.S.C. §§ 1400 *et seq.*; 34 C.F.R. § 300.7(b)(9-10).

2. Dripping Springs ISD, the district in which Sylvie resides, must provide her a free appropriate public education. 20 U.S.C. § 1401(a)(18).

3. Sylvie has the burden of proof to show that Dripping Springs ISD's educational program is inappropriate. *Tatro v. The State of Texas,* 703 F.2d 823, *aff'd in part and rev'd in part sub. nom., Irving Independent School District v. Tatro,* 468 U.S. 883 (1984).

4. To be reimbursed for her unilateral private-school placement, Sylvie must show that Dripping Springs ISD's educational program is inappropriate and her private-school program is appropriate. *School Comm. of Burlington v. Department of Ed. of Mass.,* 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter,* 114 S.Ct. 365 (1993), 20 IDELR 532.

5. Sylvie's January 1996 IEP, developed by Dripping Springs ISD, was not reasonably calculated to confer an educational benefit; therefore, it was not appropriate. *Board of Education of Hendricks Hudson Central School District v. Rowley,* 458 U.S. 176 (1982).

6. Sylvie's April 1996 IEP, developed by Dripping Springs ISD, was not reasonably calculated to confer an educational benefit; therefore, it was not appropriate. *Board of Education of Hendricks Hudson Central School District v. Rowley,* 458 U.S. 176 (1982).

7. Sylvie failed to carry her burden of proof to show that her private-school program was appropriate. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1985).

8. Dripping Springs ISD failed to identify Sylvie as a student with a serious emotional disturbance. U.S.C. §§ 1400 *et seq.;* 34 C.F.R. §§ 300.128 and 300.220.

9. In their reports, the two psychologists who evaluated Sylvie, Doug Keene and Greg Yahr, recommended services that Sylvie needs. By failing to provide these services, Dripping Springs ISD denied Sylvie a free appropriate public education.

10. Dripping Springs ISD's failure to provide Sylvie individual counseling as a related service denied her a free appropriate public education from January 1996 through the date of this Decision.

11. Due To Dripping Springs ISD's failure to provide Sylvie individual counseling from January 1996 through January 1997, Sylvie is entitled to compensatory services of one hour per week of individual or family counseling.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer hereby **ORDERS** that Sylvie's request for reimbursement of her Elan School tuition for March 1996 through the date of this Decision is hereby **DENIED.**

It is further **ORDERED** that Sylvie's request that Dripping Springs ISD pay her Élan School tuition for the remainder of the 1996-97 school year is hereby **DENIED**.

It is further **ORDERED** that when Sylvie returns to Dripping Springs ISD, her ARD shall convene to develop an IEP based on the recommendations of Doug Keene and Greg Yahr.

It is further **ORDERED** that when Sylvie returns to Dripping Springs ISD, her IEP shall include a minimum of one hour per week of individual counseling provided by a private or district counselor mutually acceptable to Sylvie, Sylvie's mother, and Dripping Springs ISD. Sylvie's IEP shall also include weekly group counseling provided by a district counselor.

It is further **ORDERED** that as a compensatory service, Sylvie be provided 40 hours of individual or family counseling. The number of hours is based on the period from January 1996 through the data of this Decision, excluding summer recess. Sylvie may schedule these sessions at any time, including during the summer recess. This compensatory counseling shall be provided by a private or district counselor mutually acceptable to Sylvie, Sylvie's mother, and Dripping Springs ISD.

It is further **ORDERED** that all relief not specifically granted is hereby **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision, this Hearing Officer makes it effective immediately.

SIGNED this 10th day of January, 1997.

/s/ Olivia B. Ruiz
Olivia B. Ruiz
Special Education Hearing Officer

Notice to the Parties

Under State Board of Education rules, it is no longer necessary for a party to perfect an appeal to state district court by filing a Motion for Rehearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact and conclusions of law. 19 Tex. Admin. Code § 157.8 (n)(o).

20 U.S.C. Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

* * *

28 U.S.C. Sec. 1254(1) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. Sec. 1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.